

89-1326 ①

Supreme Court, U.S.

FILED

FEB 12 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NANCY CROWDER, Individually and as
Independent Executrix of the Estate of
James Ralston Crowder,

Petitioner

v.

KEN SINYARD, BILL JONES, DAVID GODWIN,
H. L. PHILLIPS, GARY ADAMS, ALLEN JORDAN,
LOUIS D. RAFFAELLI, JAMES L. ELLIOTT,
CHARLES LAMBERT, CITY OF DEQUEEN, ARKANSAS,
CITY OF TEXARKANA, TEXAS, BOWIE COUNTY,
TEXAS, MILLER COUNTY, ARKANSAS,
AND SEVIER COUNTY, ARKANSAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Houston, Texas 77046
(713) 622-1530

Attorney for Petitioner

250 P2

QUESTIONS PRESENTED FOR REVIEW

1. Whether the removal to another state, without judicial authorization, of property seized under color of a warrant denied the plaintiffs below their constitutional right to "adequate, effective, and meaningful" access to the courts, within the meaning of Bounds v. Smith, 430 U.S. 817 (1977), and Boddie v. Connecticut, 401 U.S. 317 (1971), and, if so:

(a) Whether this Court's decision in City of Canton, Ohio v. Harris, ___ U.S. ___, 109 S.Ct. 1197 (1989) precludes the liability of a municipality for the unconstitutional conduct of its employees or officials taken pursuant to constitutional policies; and

(b) Whether the individual law-enforcement officials are excused from



liability by a claim of qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982) for conduct which is violative of non-discretionary duties.

2. Whether a police officer who enters premises under color of a warrant in 1981, for the purpose of searching for and seizing property not listed in the warrant, violates the Fourth Amendment, and:

(a) Whether he reasonably should have known that his actions would violate plaintiffs' constitutional rights;

(b) Whether on appeal his conduct is properly judged under the standards set forth in Texas v. Brown, 460 U.S. 730 (1983), and Arizona v. Hicks, 480 U.S. 321 (1987).

(c) Whether, in an action brought pursuant to Title 42, United States Code, Section 1983 for damages resulting from

an unreasonable search and seizure, the plaintiff has the burden of proving that no exception to the warrant requirement justified the actions taken by law-enforcement officials, and, if so, whether that burden is met by proof that officers intentionally searched for property not listed in the warrant.

PARTIES TO THE PROCEEDINGS

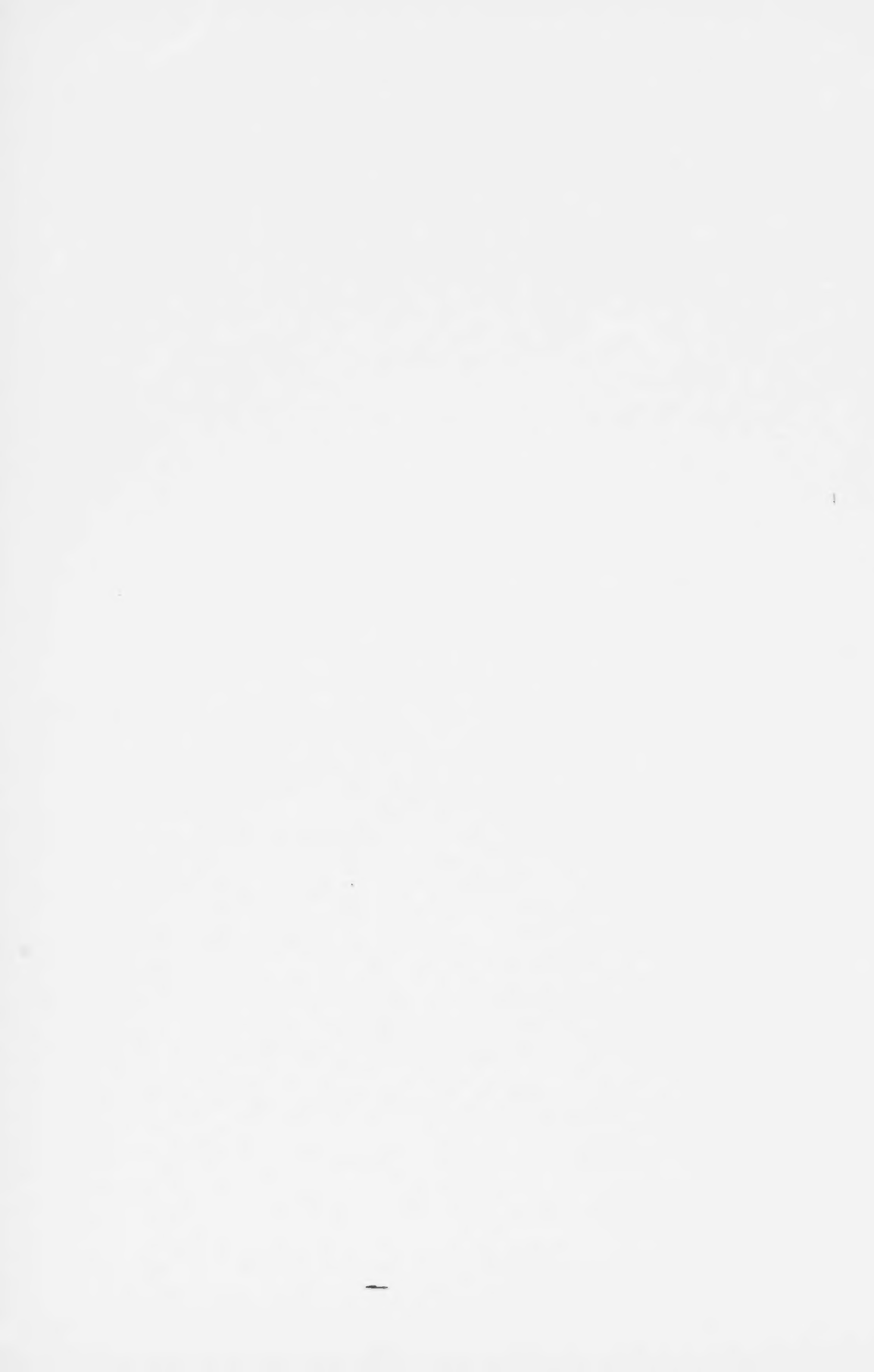
In the United States District Court for
the Eastern District of Texas:

PLAINTIFFS

James Ralston Crowder and Nancy Pettus
Crowder.

DEFENDANTS

Ken Sinyard; H. L. Phillips; Allen
Jordan; Bill Jones; David Godwin; Gary
Adams; Charles Campbell (dismissed by
judgment n.o.v.); Louis Aycock (no
liability on jury verdict); Louis
Raffaelli; James Elliott; Charles
Lambert; R. W. Neel (no liability on
jury verdict); Don Lambert (no liability
on jury verdict); Miller County, Arkan-
sas; City of DeQueen, Arkansas; Sevier
County, Arkansas; City of Texarkana,
Texas; Bowie County, Texas; State of
Texas (dismissed prior to trial); State
of Arkansas (dismissed prior to trial).



In the United States Court of Appeals for
the Fifth Circuit:

APPELLEE-CROSS/APPELLANT

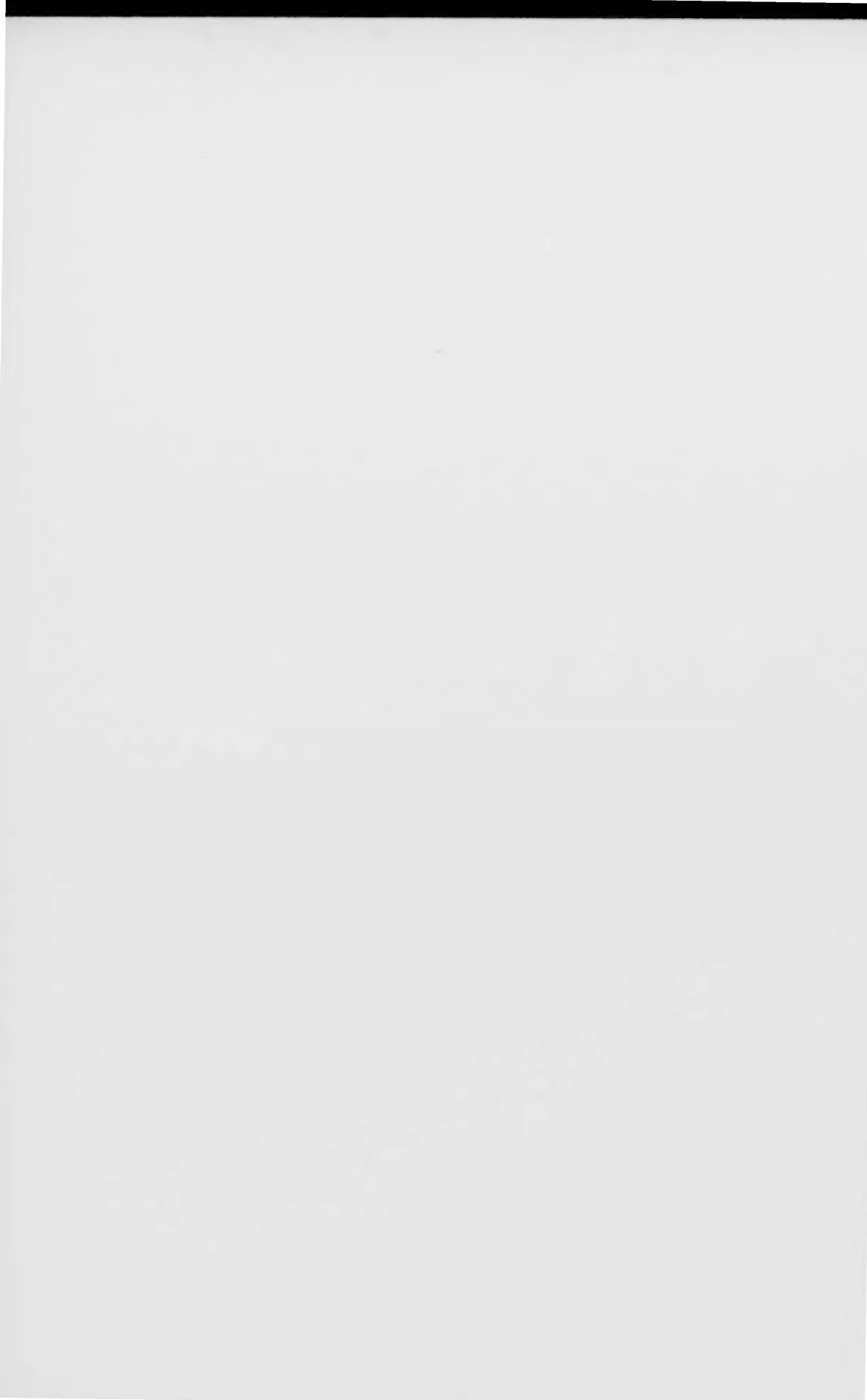
Nancy Crowder, Individually and as
Independent Executrix of the Estate of
James Ralston Crowder.

APPELLANT (Attorney's Fees Only)

Winston P. Crowder

APPELLANTS

Ken Sinyard (judgment reversed); H. L.
Phillips (judgment reversed); Allen
Jordan (judgment reversed); Bill Jones
(judgment reversed); David Godwin
(judgment reversed); Gary Adams (judgment
reversed); Charles Campbell (judgment
n.o.v. affirmed); Louis Raffaelli
(judgment reversed); James Elliott
(judgment reversed); Charles Lambert
(judgment reversed); Miller County,
Arkansas (judgment reversed and remanded
for retrial); City of DeQueen, Arkansas
(judgment reversed and remanded for



retrial); Sevier County, Arkansas
(judgment reversed and remanded for
retrial); Bowie County, Texas (judgment
reversed).

CROSS-APPELLEE

City of Texarkana, Texas (judgment
n.o.v. affirmed).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered September 21, 1989, is reported at 884 F.2d 804, and is reproduced in the Appendix to this Petition commencing at Page A-1.

The memorandum opinion of the United States District Court for the Eastern District of Texas on the motions for judgment n.o.v. and for new trial is not reported officially, but is reproduced in the Appendix to this Petition commencing at Page A-119.

JURISDICTIONAL STATEMENT

This is a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit from a denial, on November 13, 1989, of a petition for rehearing and suggestion of en banc consideration of the judgment of the court rendered on September 21, 1989. Jurisdiction of this court is invoked under Title 28, United States Code, Sections 1254 and 2101.



CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

United States Constitution, Article IV, Section 2.

* * * * *

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * * * *

United States Constitution, Amendment I.

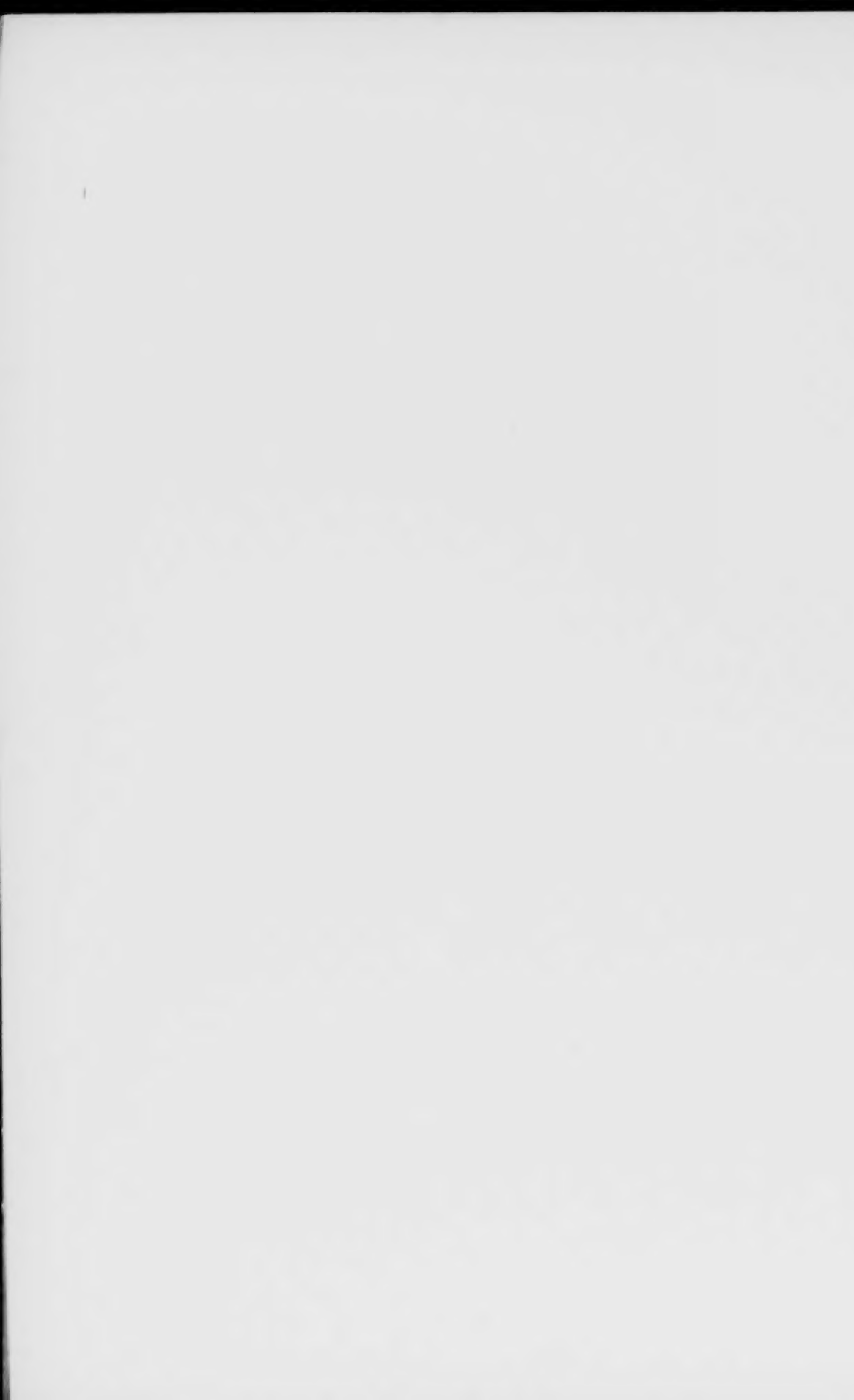
Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

United States Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the



State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

42 U.S.C., Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article 18.11, Texas Code of Criminal Procedure, 1965, as amended eff. 1974.

When a warrant has been issued to search a suspected place and there be found any property as alleged to have been there kept or concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate.



Article 18.12, Texas Code of Criminal Procedure, 1965, as amended eff. 1974.

The magistrate, upon the return of a search warrant, shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him.

Article 18.13, Texas Code of Criminal Procedure, 1965 as amended eff. 1974.

If the magistrate be not satisfied upon investigation that there was good ground for the issuance of the warrant, he shall discharge the defendant and order restitution of the property taken from him, except for criminal instruments. In such case, the criminal instruments shall be kept by the sheriff subject to the order of the proper court.

Article 47.01, Texas Code of Criminal Procedure, 1965.

An officer who comes into custody of property alleged to have been stolen must hold it subject to the order of the proper court or magistrate.

Article 47.01a, Texas Code of Criminal Procedure, 1977.

If no criminal action is pending, a magistrate of the county or city in which the property is being held may hold a hearing to determine the right to possession of the property, upon the petition of any interested person. The magistrate shall order the property delivered to whoever has the superior



right to possession, subject to the condition that the property be made available to the prosecuting authority should it be needed in the future, or the magistrate may remand the property to the custody of the peace officer.

Article 47.02, Texas Code of Criminal Procedure, 1965.

Upon the trial of any criminal action for theft, or for any other illegal acquisition of property which is by law a penal offense, the court trying the case shall order the property to be restored to the person appearing by the proof to be the owner of the same.

Likewise, the judge of any court in which the trial of any criminal action for theft or any other illegal acquisition of property which is by law a penal offense is pending may, upon hearing, if it is proved to the satisfaction of the judge of said court that any person is a true owner of the property alleged to have been stolen, and which is in possession of a peace officer, by written order, direct the property to be restored to such owner.

Article 47.03, Texas Code of Criminal Procedure, 1965.

When an officer seizes property alleged to have been stolen, he shall immediately file a schedule of the same, and its value, with the magistrate or court having jurisdiction of the case, certifying that the property has been seized by him, and the reason therefor.



Article 47.04, Texas Code of Criminal Procedure, 1965.

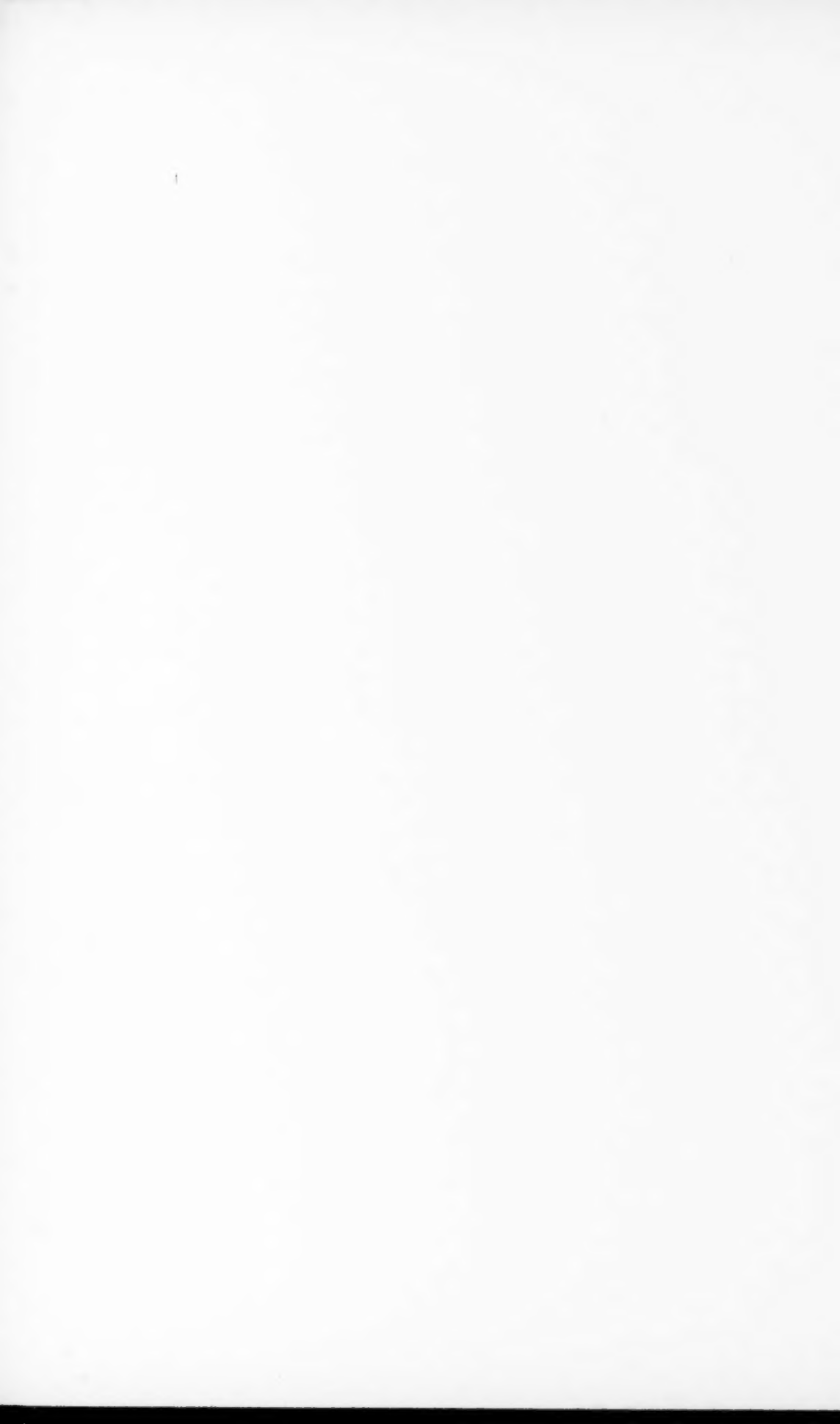
Upon a examining trial, if it is proven to the satisfaction of the magistrate that any person is the true owner of property alleged to have been stolen, and which is in possession of a peace officer, he may upon motion by the state by written order direct the property to be restored to such owner subject to the conditions that such property shall be made available to the state or by order of any court having jurisdiction over the offense to be used for evidentiary purposes.

STATEMENT OF THE CASE

I. The Proceedings Below.

Ralston and Nancy Crowder brought suit in the United States District Court for the Eastern District of Texas, pursuant to Title 42, United States Code, Section 1983, against law enforcement officials from seven jurisdictions in two states. The Plaintiffs alleged constitutional violations arising from the search of their business premises in Texarkana, Bowie County, Texas and seizure of numerous items of property, and the immediate removal of the property, to Arkansas. Jurisdiction of the district court was grounded on Title 28, United States Code, Section 1331, but the Plaintiffs also invoked the pendent jurisdiction of the court over claims arising under Texas law.

Trial to a jury resulted in verdicts finding that the defendants had violated



the plaintiffs' right of access to the courts and that they had intentionally searched for property not listed in the warrant, in violation of plaintiffs' right to be free from unreasonable searches and seizures. Judgment in the plaintiffs' favor was entered in the amount of \$90,000.00 in actual damages against ten individual defendants, two cities and three counties, and \$1000.00 each in punitive damages against ten individual officers. A separate judgment for attorney's fees under 42 U.S.C. Section 1988 was entered.

The trial court entered judgment notwithstanding the verdict for one individual defendant, Charles Campbell, and for the City of Texarkana, Texas. All remaining defendants appealed to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C., Section 1291. The plaintiffs cross-appealed the



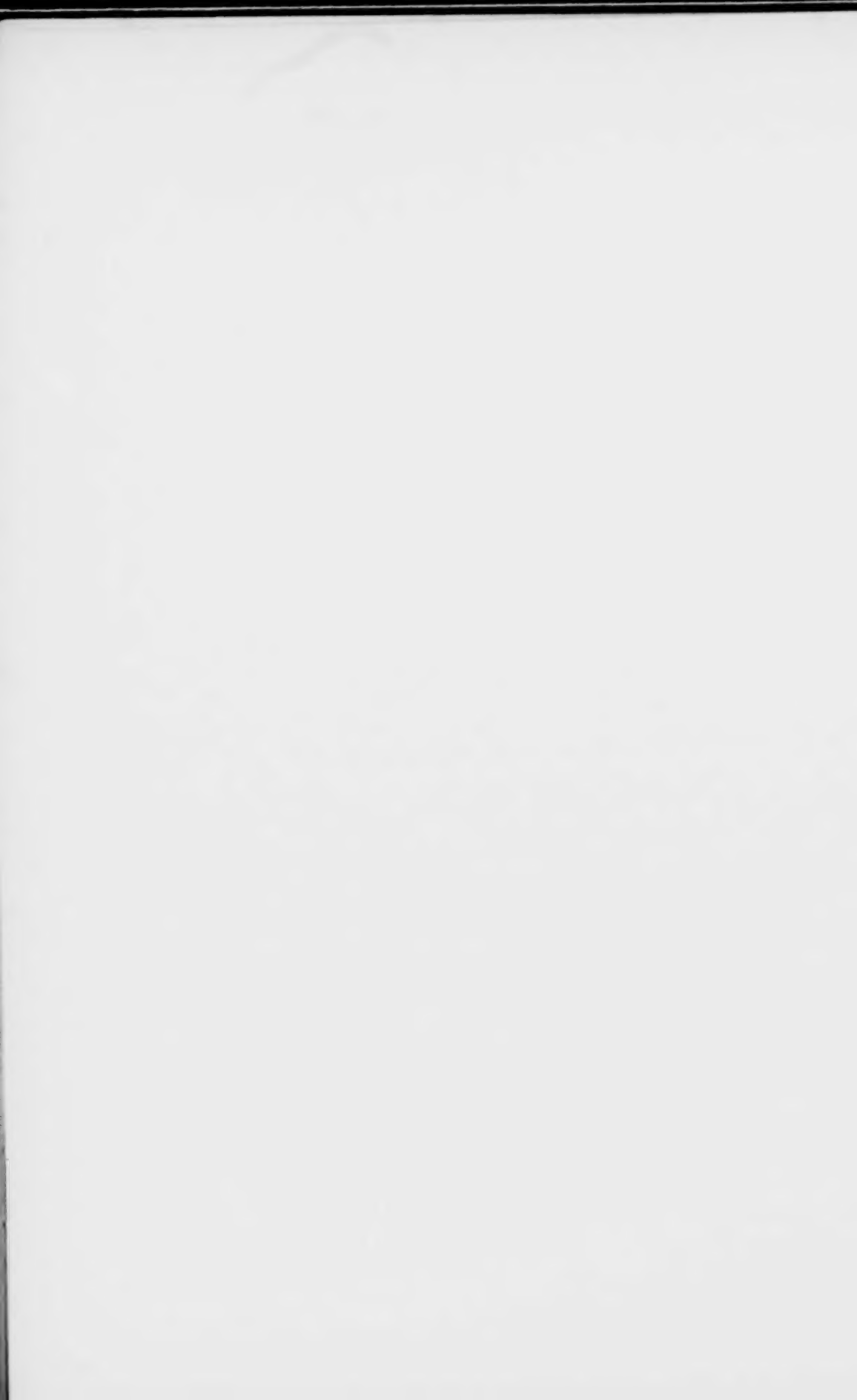
grant of judgment n.o.v. for the City of Texarkana. One attorney also appealed the award of fees, which was consolidated with the appeal on the merits for argument.

The Fifth Circuit panel reversed the all judgments in favor of the plaintiffs, rendered as to each individual defendant, remanded the search issue for retrial as to Sevier County, Miller County and the City of DeQueen, and vacated the award of attorney's fees.

A timely petition for rehearing and suggestion for en banc consideration was denied on November 13 1989. This petition followed.

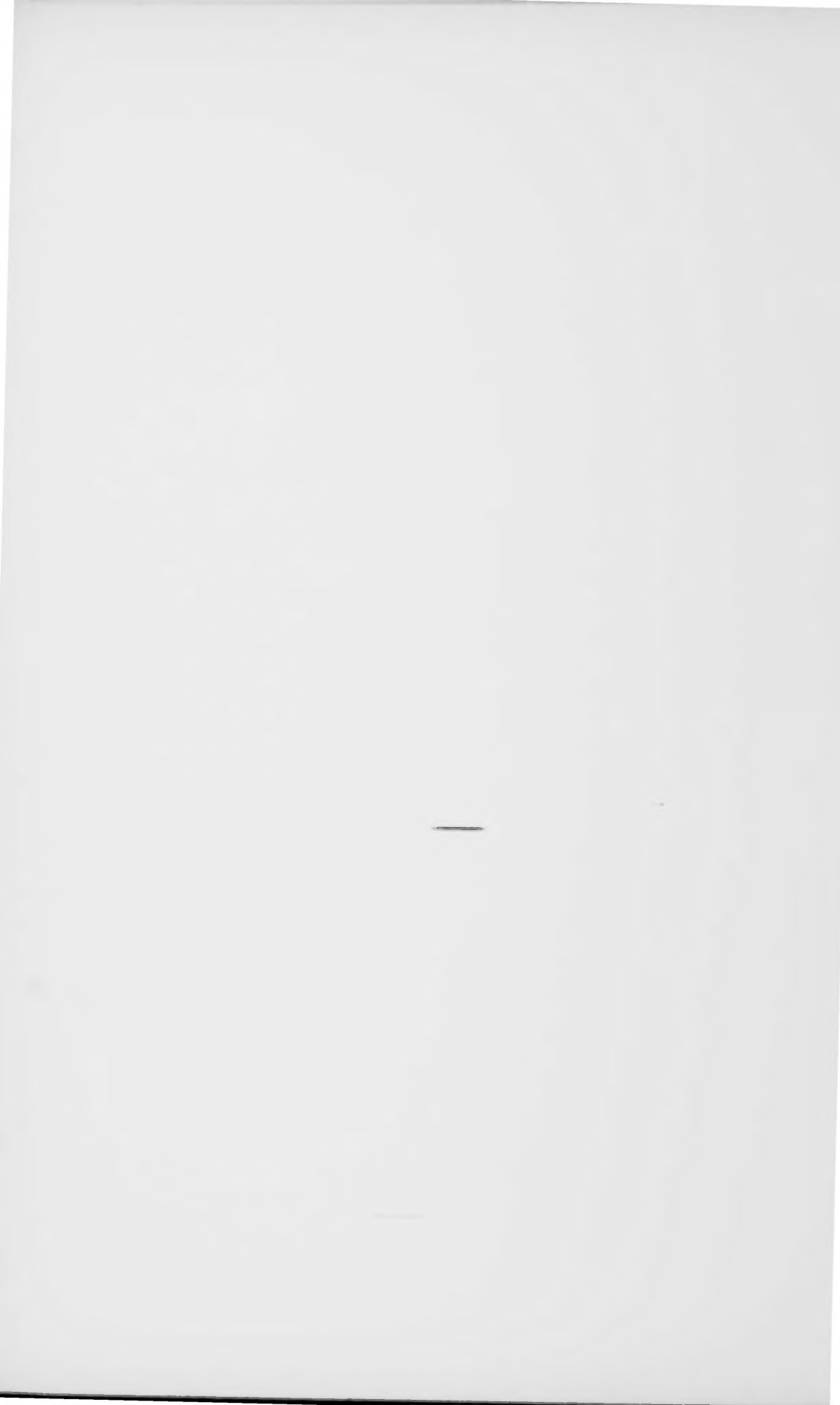
II. Factual Background.

On January 27 and 28, 1981 law enforcement officers from seven jurisdictions, acting under color of a warrant issued by a magistrate in Bowie County, Texas, entered the business premises of



the plaintiffs, J. Ralston Crowder and his wife, Nancy Crowder, who were in their seventies at the time. They were accompanied by two burglarly suspects and the District Attorney and Assistant District Attorney of Bowie County. The warrant authorized a search for and seizure of four items of jewelry and coins and one piece of paper. During a three hour search, numerous items of jewelry and coins were removed from locked file safes, but were not marked or tagged.

After the search ended, the officers left with a paper bag full of seized property. Plaintiff's request for an inventory and a copy of the warrant was denied. An inventory was prepared at the Texarkana, Texas police station showing that forty-six items were seized, and the property was immediately released to the custody of defendant H. L.



Phillips, a deputy sheriff of Miller County, Arkansas, who took the property across the state line to Texarkana, Arkansas, without judicial authorization and without notice to the plaintiffs.

Plaintiffs initiated a proceeding in the district court of Bowie County against the Texas officers and "other persons unknown," seeking to have the seized property deposited with the court until a determination of ownership could be made. Finding that the plaintiffs would be irreparably harmed unless the property were deposited in custodia legis, the district court entered an order which permitted all parties access to view the property after it was deposited with the Clerk of the Court. Without informing the court that the property had been relinquished to the custody of officers of another state, the Texas officers filed an appeal, which

was subsequently dismissed for lack of jurisdiction.

After the defendants continued to refuse to permit the plaintiffs to have a copy of the warrant and return, the plaintiffs initiated a damages suit under state and federal causes of action, naming all Arkansas and Texas officers who had been identified through discovery in the state proceedings, and sought a mandatory injunction to have the property deposited with the court. The federal district court, finding that the state remedies had been frustrated by the removal of the property to Arkansas, ordered all defendants to comply with the state court order. All defendants claimed they were unable to comply, for various reasons, but an anonymous party did deposit with the District Clerk of Bowie County, Texas sixteen items of gold and silver which were ostensibly



listed on the return. The remainder of the property was never used in any criminal proceeding in either Arkansas or Texas, and was not produced in court until after trial had commenced.

Subsequent to the entry of the damages judgment, plaintiff J. Ralston Crowder died, and his widow, petitioner Nancy Crowder, has continued the proceedings in her individual and representative capacities.



ARGUMENT AND AUTHORITIES

PETITIONER'S FIRST QUESTION

Whether the removal to another state, without judicial authorization, of property seized under color of a warrant denied the plaintiffs below their constitutional right to "adequate, effective, and meaningful" access to the courts, within the meaning of Bounds v. Smith and Boddie v. Connecticut.

Articles 18.01 et seq. and Articles 47.01 et seq. of the Texas Code of Criminal Procedure impose a duty on a seizing officer to maintain custody of seized property until ordered otherwise by a court. Article 47.01 et seq. specifically grants authority to Texas court to adjudicate ownership or right of possession. The Hon. William Wayne Justice, trial judge below, in his Memorandum Opinion reviewing defendants' motions for judgment and for new trial (App. C, pp. A-119, et seq.) found that the statutory scheme contemplates "unbroken control" of the state court



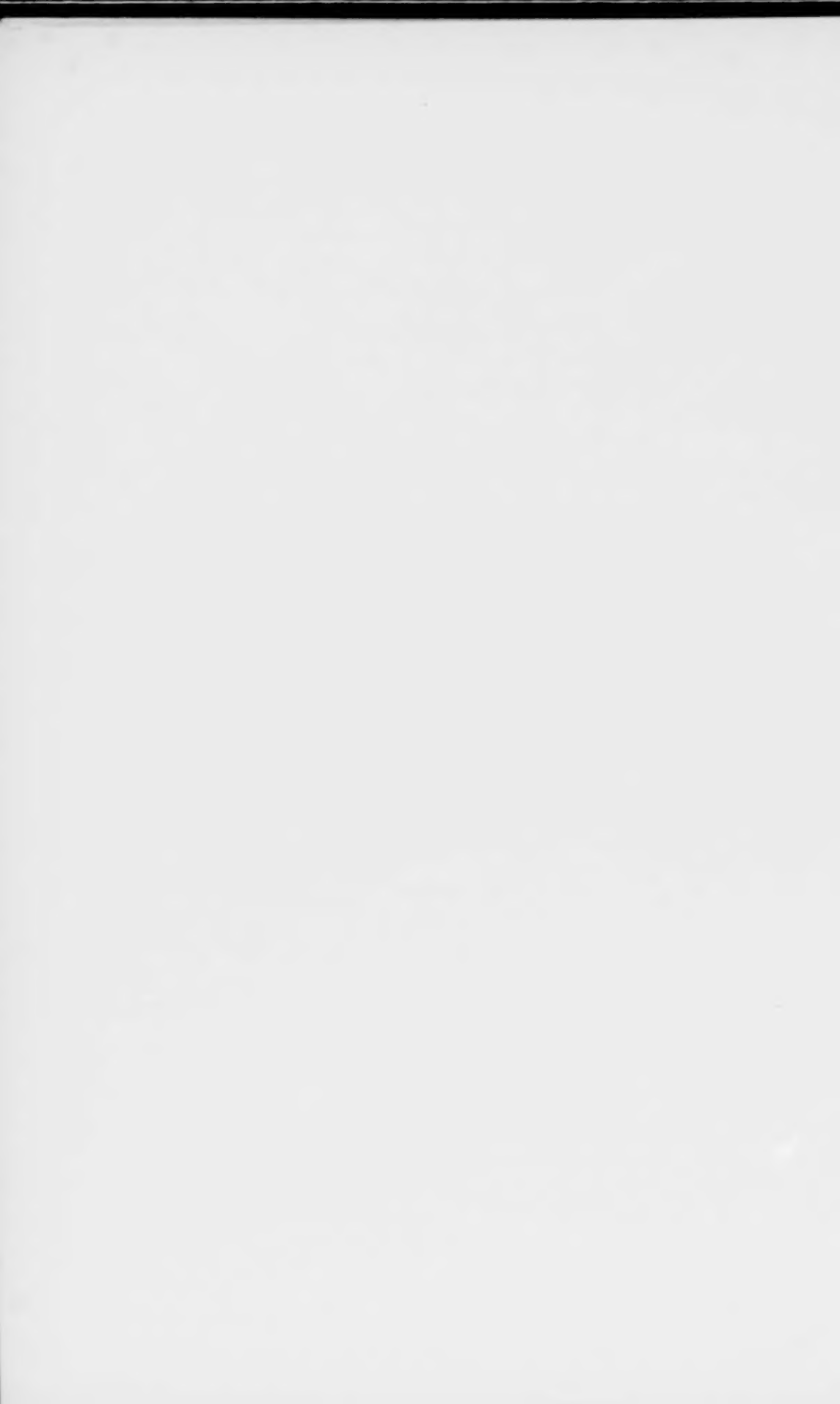
over the res. (A-146) It would be an empty exercise for a court to order the return of property which is not within its jurisdiction. An individual found to have a superior right of possession to all other persons cannot gain possession if the court cannot place the property in his hands.

The panel which rendered its decision on September 21, 1989 held that as a matter of law the Plaintiffs' right of access to the courts of the state of Texas was not violated, even though the defendants had secretly moved the property to Arkansas and had informed neither court of their purported inability to return the property to Texas.

The state court predicated its order on a finding that the Crowders would be "irreparably ~~dam~~aged" if the property was not preserved in custodia legis. The federal court found that the remedies

provided to the Crowders by the Texas statutes had been "frustrated," and stated that return of the property to the jurisdiction out of which the search warrant was issued to be necessary in order that the procedures set out in the statutes could be effectuated. However, the Fifth Circuit panel found that not only did the Crowders have access to the court, they had meaningful access, because the court entered the Order they sought, to wit: the seizing officers were ordered to place the property in custodia legis. (The panel further found that effective legal redress was available to the Crowders in the form of a tort claim and in personam jurisdiction over the Arkansas officers who were later discovered to be withholding the property from the seizing officers.

In this case, in personam jurisdiction over all participants in the search



and seizure and two court orders failed to produce the seized property. Long-arm jurisdiction over every law enforcement officer in the State of Arkansas could not have overcome the impediment to the Texas courts' ability to exercise the power over the seized property given to it by Texas law.

The source of the guarantee of access to the judicial system is found in multiple areas of the Constitution. It is one of the privileges of citizenship, guaranteed to the citizens of the several states by Article IV, Section 2. Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142 (1907). It has also been considered to be a part of the First Amendment right to petition for redress of grievances. California Motor Transport Co. v. Trucking Unlimited 404 U.S. 508 (1972). A third source of the guarantee is the Fourteenth Amendment. Wolff v.



McDonnell, 418 U.S. 529 (1974). See Lavicky v. Burnett 758 F.2d 468 (10th Cir. 1985). Much of our legal history is concerned with the particulars of access to the court and the evaluation of the framework within which grievances and claims are decided. Frustration of the remedy results in the loss of a fundamental, substantive right to challenge wrongs committed in a variety of ways. The defendants below usurped the judicial function in a kind of "informal replevin without benefit of judicial proceedings." Wolfenbarger v. Williams, 836 F.2d 930, 936 (10th Cir. 1987). That usurpation of the judicial function could not permissibly operate to impose additional duties on the plaintiffs to repeatedly demand, in a variety of forums, that the property be produced in accordance with the applicable law.

Plaintiffs claimed below that the



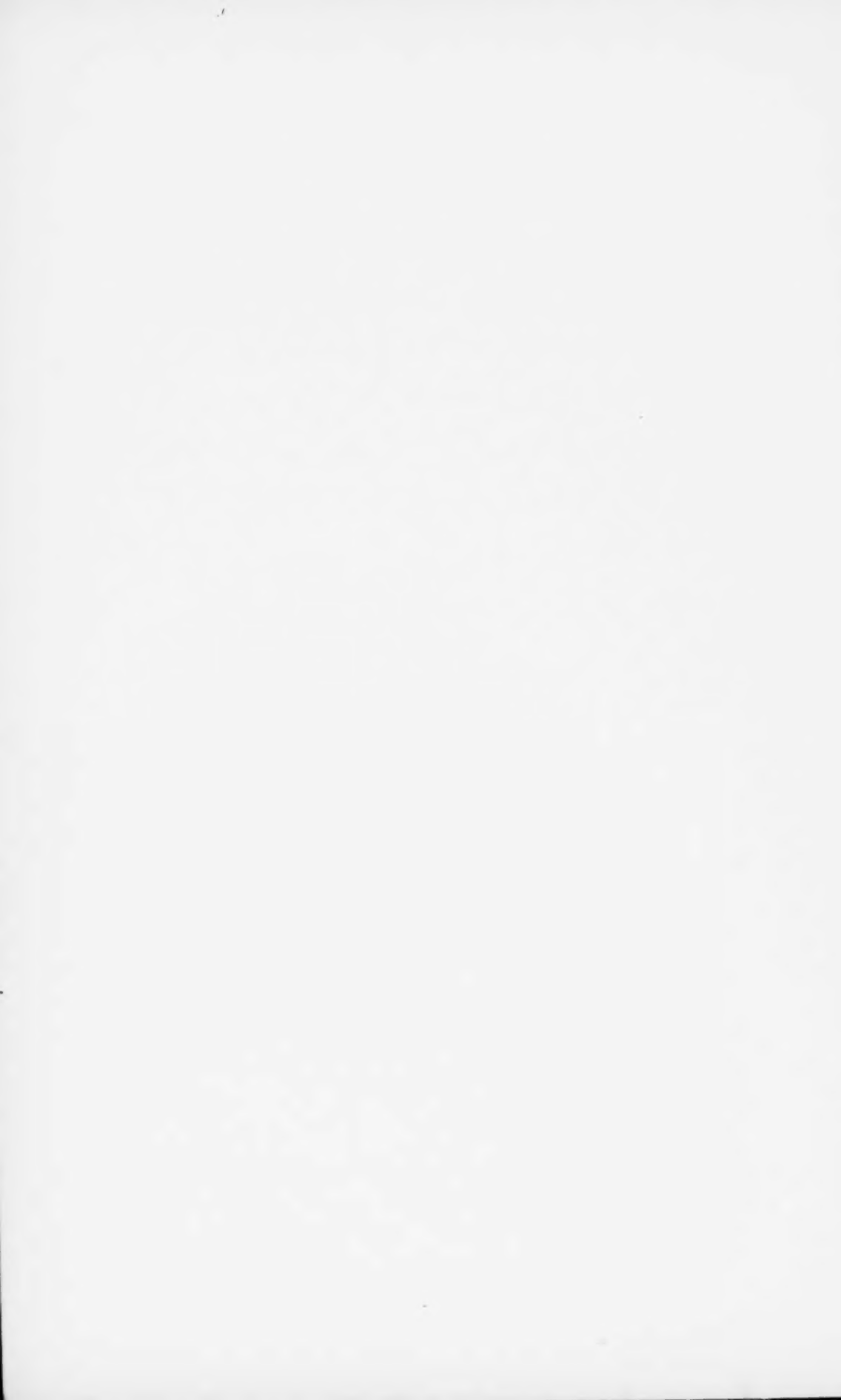
Texas scheme is the process they were due when their ¹ property was seized. Petitioner submits that the Fifth Circuit panel erred in holding that no impairment or denial of the right of access to the courts resulted from the removal of the seized property. First the panel erred in holding that the Crowders were not prejudiced by the removal, because they were able to obtain the orders they sought. Second the panel erred in holding that the availability of other remedies obviated the Plaintiffs' claim for relief under the Texas Code of Criminal Procedure.

In Bounds v. Smith, 420 U.S. 817 (1977), this Court held the existence of a judicial remedy or framework for the resolution of disputes is not alone enough to satisfy the constitutional guarantee. Hence, the Court found that the State had an obligation to make



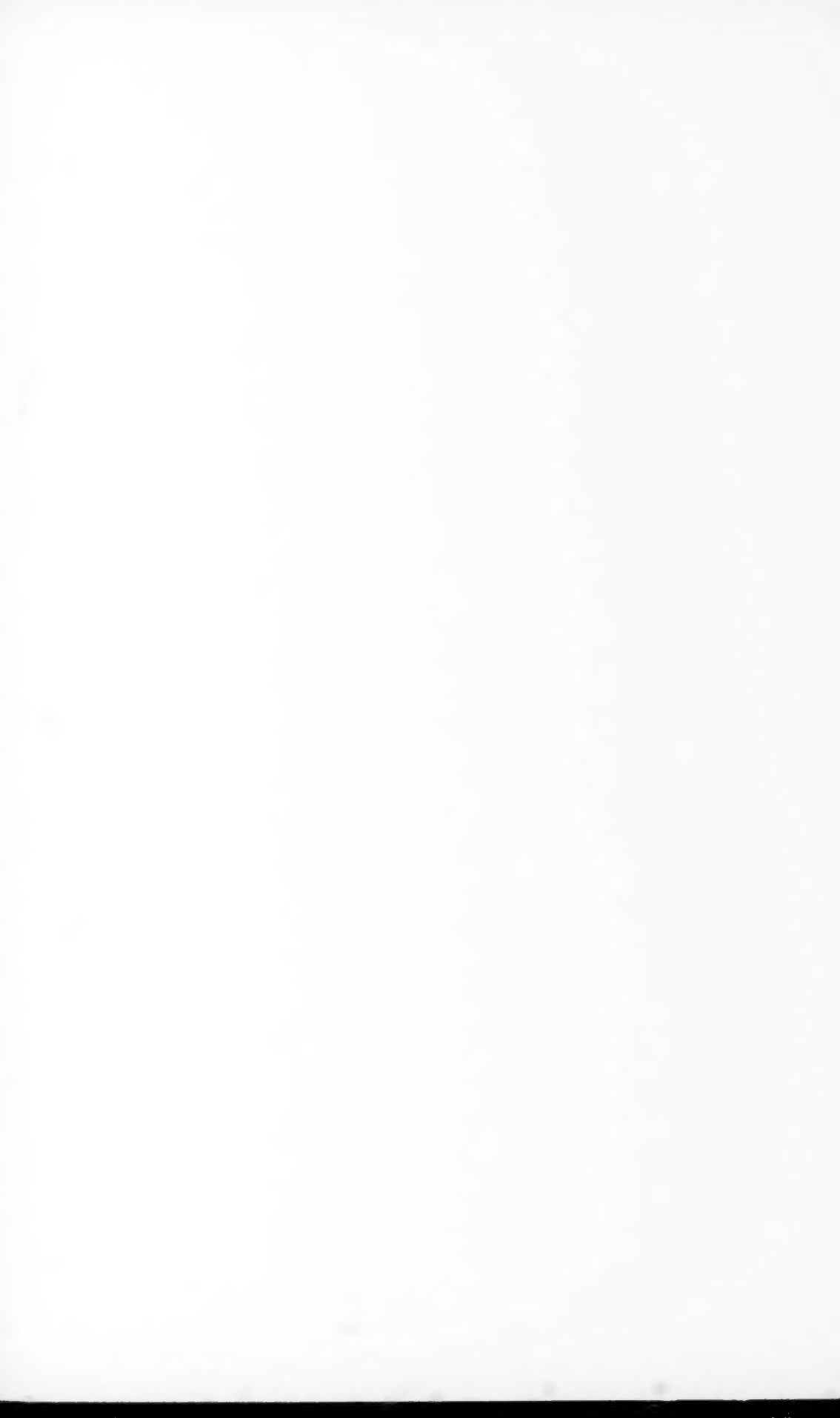
access to the court, "adequate, effective, and meaningful" for prisoners by providing legal materials for use in preparing for court. Petitioner submits that a court powerless to effectuate its authority over seized property cannot provide "adequate, effective, and meaningful" access to the system within which it is obligated to work. Further, as in Boddie v. Connecticut, 401 U.S. 371 (1971), when the State controls the exclusive means of dispute resolution, it is the obligation of state officials to assure adequate effective and meaningful access: it is not the citizen's burden to repeatedly request that state officers perform duties assigned to them by law. Compare, Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986)

There is no meaningful access to the courts if a claimant cannot be assured that his property will be returned to him



if it has been wrongfully taken. A court's order entered in the face of a complete lack of ability to compel the disposition of the property is meaningless. Further, even if the Plaintiffs had been able to obtain a copy of the alleged inventory, it would have been useless in the absence of viewing the property itself, because the descriptions of property were so vague and indefinite that Plaintiff had no way of knowing what property the Defendants admitted to taking.

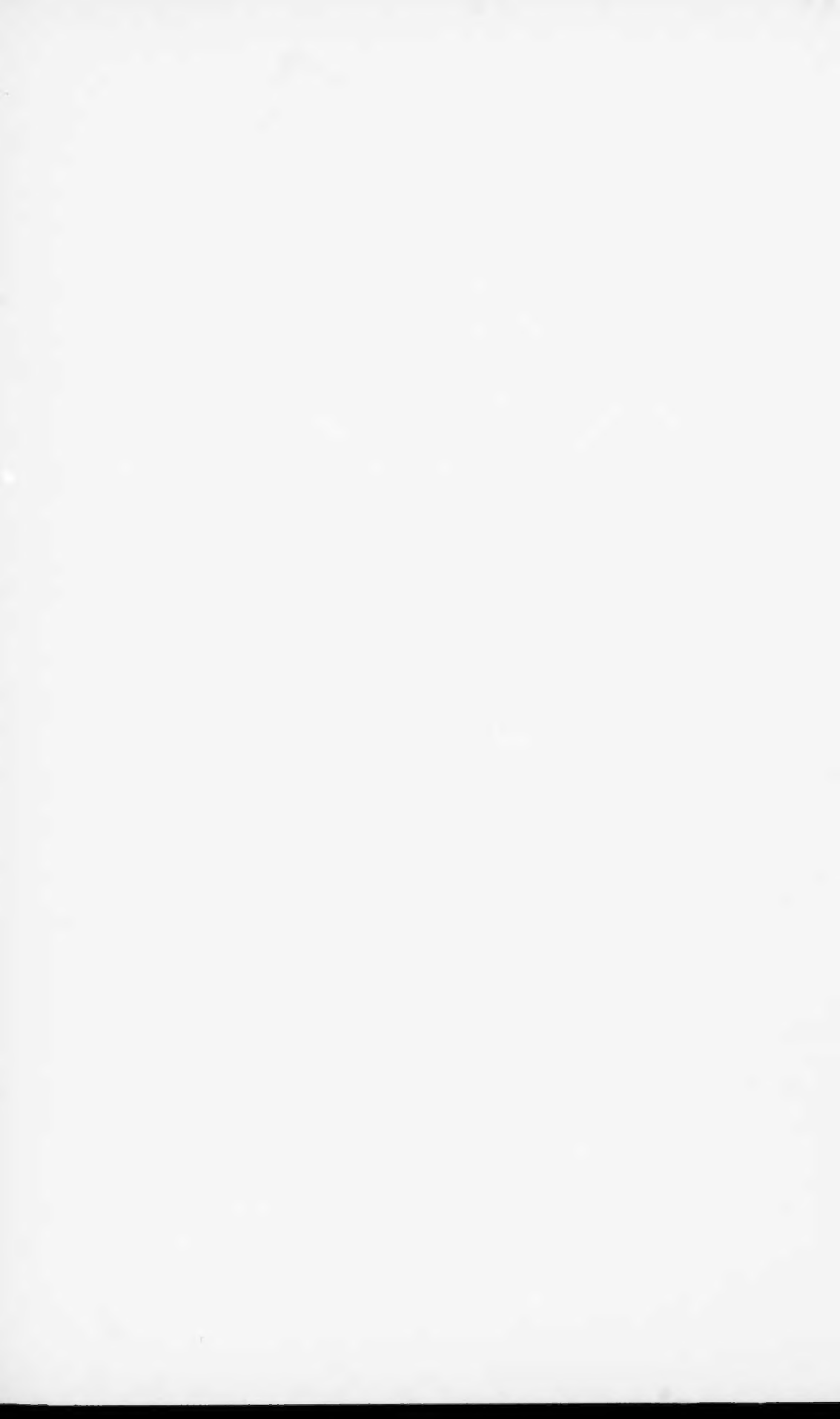
The panel indicates that because a tort remedy is available for loss of the property, the Plaintiffs were not deprived from access to the courts for that purpose. However, this specious rationale constitutes a back door attempt to apply the line of cases beginning with Parratt v. Taylor, 451 U.S. 527 (1981) to the deprivation of a substan-



tive constitutional right. As pointed out supra, the right of access to the courts is a substantive right and the statutory scheme which defendants frustrated by removing the property to Arkansas is the remedy provided by state law.

Finally, prejudice to the plaintiffs is patent on the record. Not only were they unable to adjudicate ownership and possession, both the state court and the federal court found prejudice to them unless the state statutes were implemented. Further, the panel erroneously failed to consider that plaintiffs sought all remedies in their federal court suit.

The City of Texarkana, Texas was held liable on the jury verdict for the unconstitutional removal of property to Arkansas. The trial court granted judgment notwithstanding the verdict to



the City because the plaintiffs had not proved that the municipal policies which resulted in constitutional injury to the plaintiffs were unconstitutional in themselves.

In City of Canton, Ohio v. Harris, ___ U. S. ___, 109 S.Ct. 1197 (1989) this court held that a custom or policy did not have to be unconstitutional in order to be the moving force in a constitutional injury. The Fifth Circuit erroneously affirmed the judgment notwithstanding the verdict, negating the jury's finding of liability. This Court should consider whether under the circumstances of this case an unconstitutional policy is the only basis for municipal liability.

Further, the individual defendants should not be able to claim qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), when they have violated

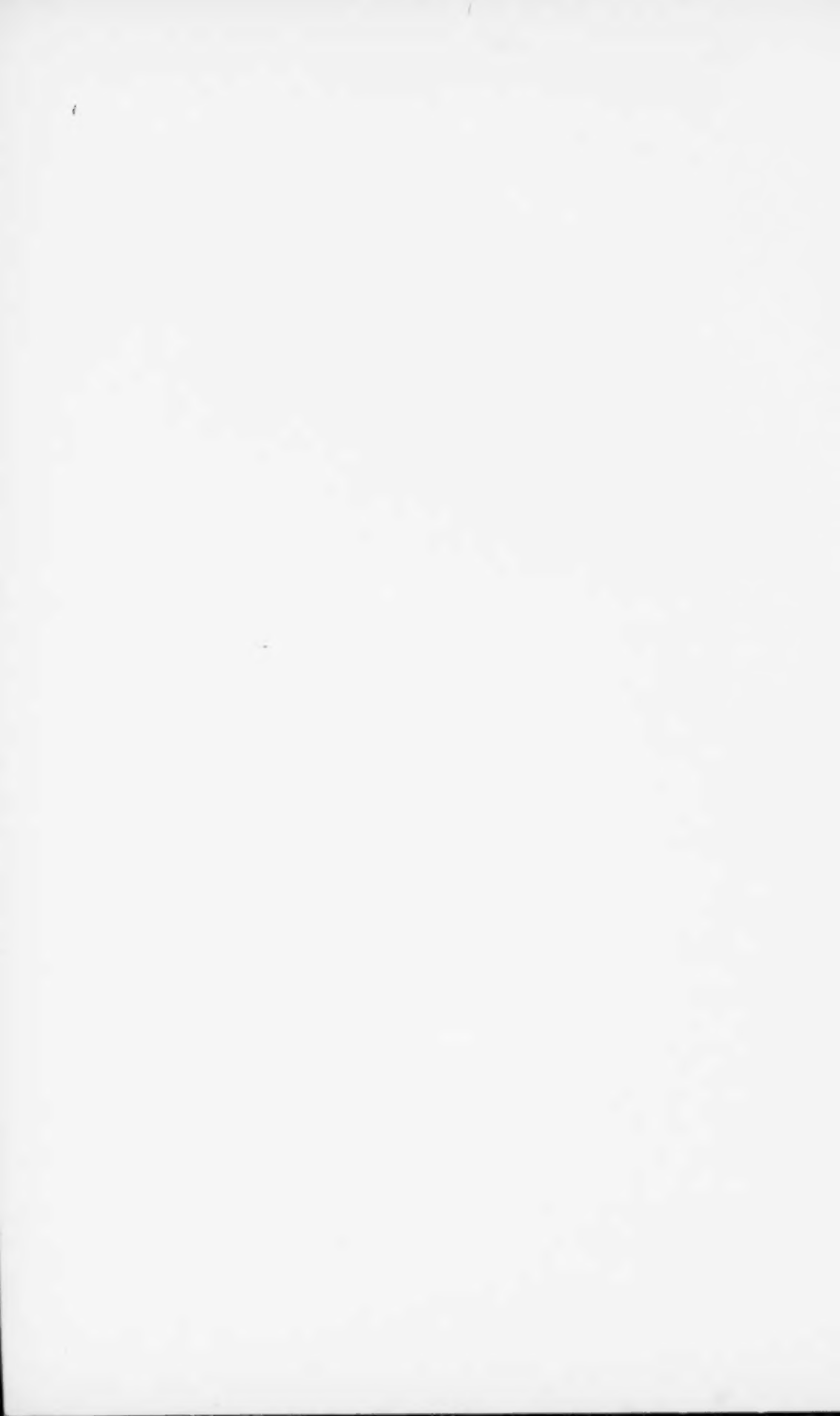
non-discretionary statutory duties. The essence of the qualified immunity defense is discretionary choice by the official whose conduct is challenged. Where state law does not permit the exercise of discretion, not only must the official necessarily know the consequences of his conduct, he may not invoke the defense.



PETITIONER'S SECOND QUESTION

Whether a police officer who enters premises under color of a warrant in 1981, for the purpose of searching for and property not listed in the warrant, violates the Fourth Amendment.

The jury found that a number of Arkansas officers intentionally searched for property not listed in the warrant behind which they entered the Crowders' business premises. The Arkansas officers did not know the contents of the warrant, and were not searching for any item listed in the warrant affidavit. They were looking for items on their stolen property lists, brought with them to the scene for the purpose of recovery, regardless of court approval. The officers apparently viewed the search warrant as a general admission ticket to search. Trial testimony repeatedly confirmed that the officers believed, on the basis of what the suspects had told



them, that all property taken in the Arkansas burglaries had been brought to Crowder's office in Texarkana, Texas. Nevertheless, no presentation was made to the magistrate in order to obtain a warrant authorizing the seizure of such property. Again, the officers, and the burglary suspects they employed in the search, usurped the judicial function by making on-the-scene determinations of probable cause. There was as much probable cause to obtain a warrant for property taken in other burglaries as there was to obtain the warrant actually issued.^{1/}

The panel held that because the Arkansas officers looked in the same

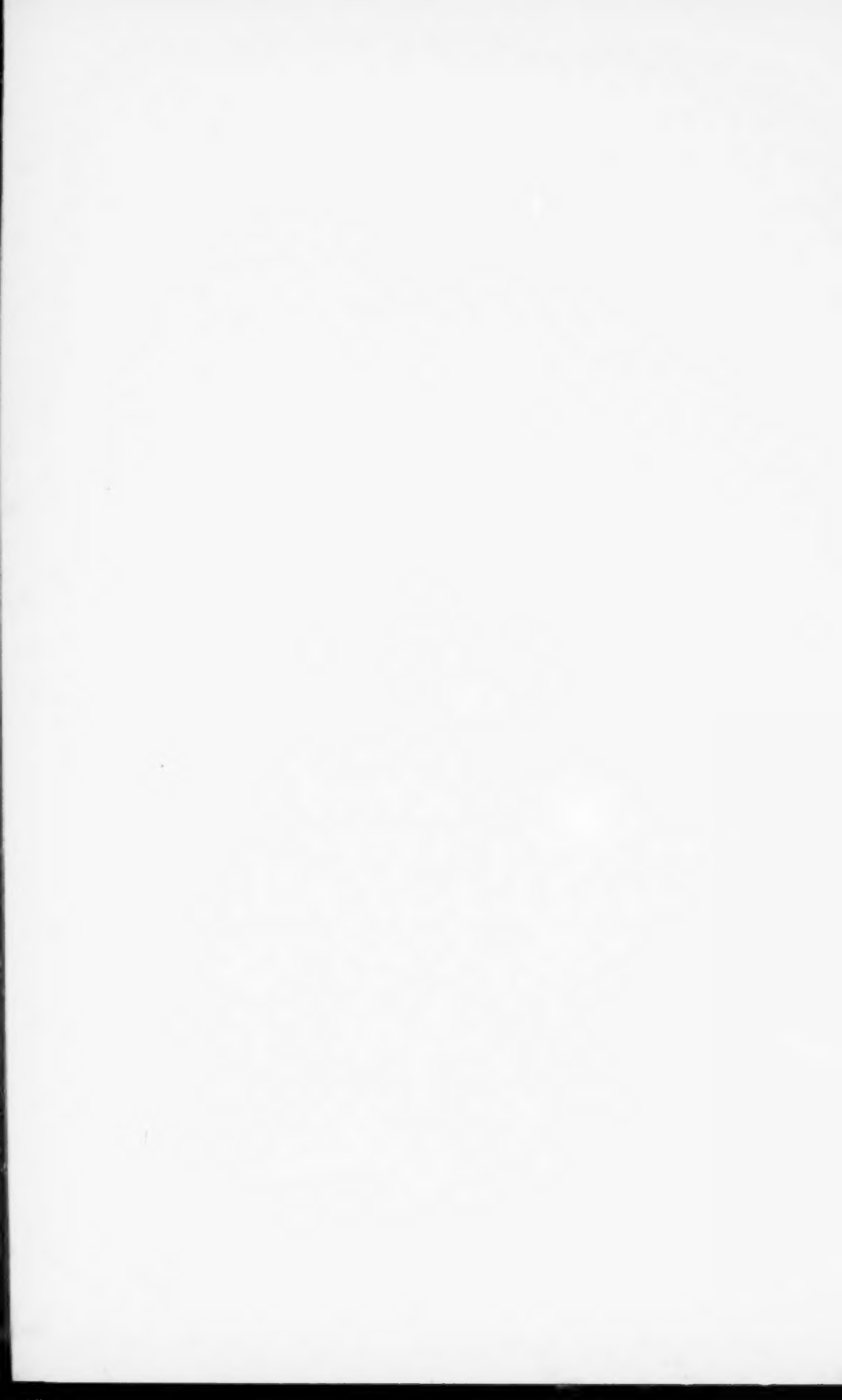
^{1/} Plaintiffs have maintained that the warrant affidavit fails to state probable cause under applicable authority. However, the jury found that the officers reasonably relied upon the warrant, and plaintiffs have not been successful in arguing the defects in the warrant affidavit.



places as the Texas officers they did not violate the Fourth Amendment. The panel also held that the subjective intent of the officers was irrelevant. However, this Court has never held that a warrant is a carte blanche authorization to search for and seize any item of property they wanted to recover.

The panel opinion conflicts with the express terms of the Fourth Amendment itself, in that the Amendment requires that the warrant particularly describe the property to be seized. If the officers go to the premises intending to find and seize items not listed on the warrant, there is not even lip service to the Fourth Amendment command.

Further, at the time of the search, the plurality discussion of inadvertence with respect to the discovery and seizure of property not listed in a warrant, found in Coolidge v. New

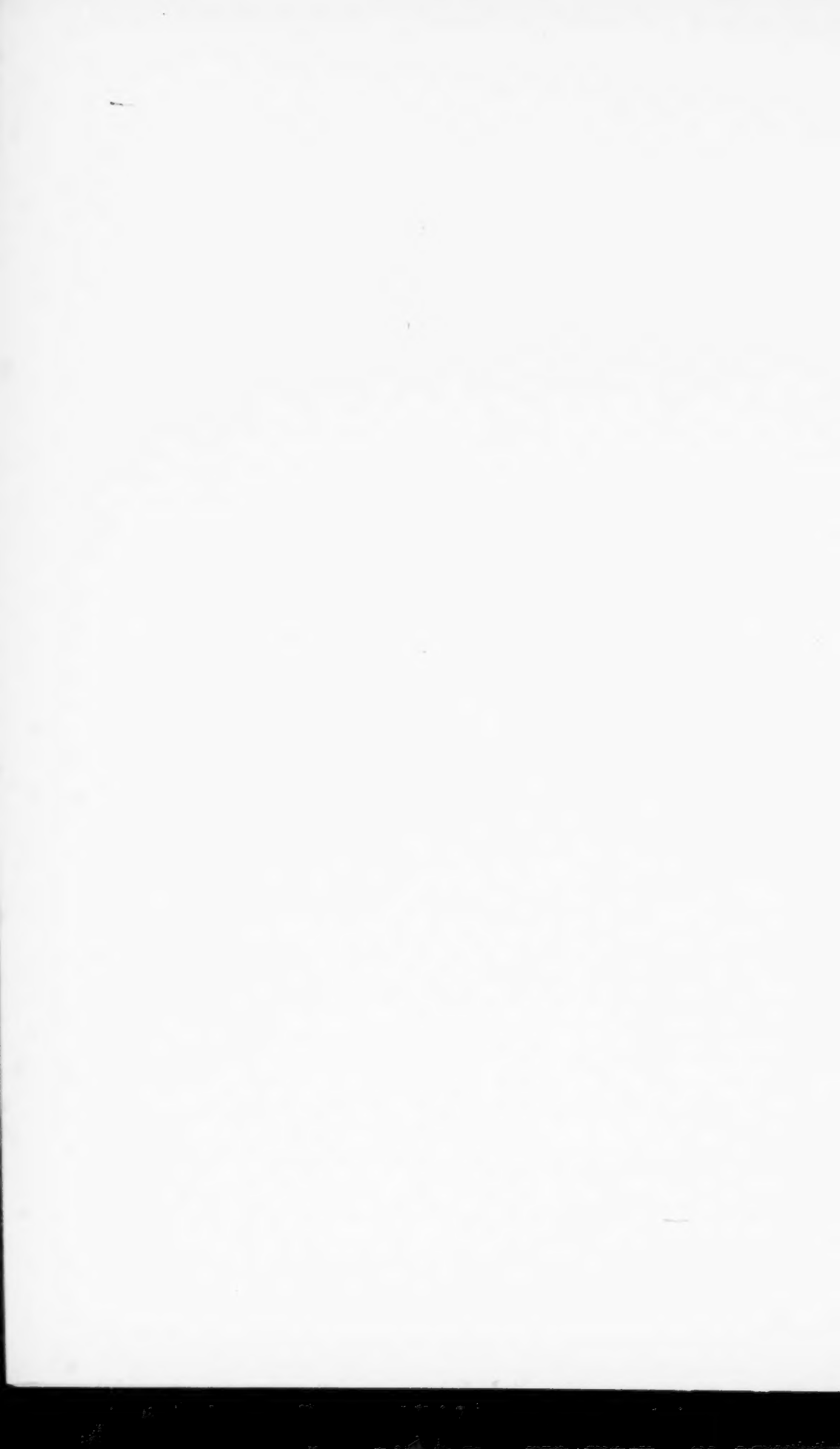


Hampshire, 403 U.S. 433 (1971), was generally accepted in the lower courts to be the prevailing standard for seizures which were claimed to be in "plain view." Intentional searching negates any question of inadvertence; the subjective intent of the officers is materially relevant to any claim of plain view discovery as a justification for a warrantless seizure.

Further, not until years after the search and seizure in this case did this Court announce a probable cause standard for warrantless seizures in Texas v. Brown, 460 U.S. 730 (1983) and Arizona v. Hicks 480 U.S. 321 (1987). Not only was the law well-settled at the time of the search here in question, the legality of the officers actions, and their entitlement to claim qualified immunity, should be judged by the state of the law at the time of the search, rather than

on the basis of a purported change in the law subsequent in time. Further, a change in the law does not mean that the law was unsettled at the time of the events made the subject of this case.

In addition, the panel erred in holding that it was the plaintiffs' burden to prove that the property was not in plain view at the time of the seizure. The plaintiffs successfully assumed the burden of proving that the defendants intentionally searched for property not listed in the warrant, which proof necessarily negates a contention that the property was in plain view. It has been the burden of government to prove the lawfulness of a warrantless seizure, and in the context of a civil rights suit, such a claim amounts to an affirmative defense which should be proven by the party asserting it. The panel erred in holding that the



trial court erroneously charged the jury that the defendants had the burden of proving the property seized was in plain view of the seizing officers.



CONCLUSION

The frustration of the jurisdiction of the Texas court over the property removed to Arkansas in violation of Texas law governing disposition of seized property destroyed the Plaintiffs' ability to pursue their post-deprivation remedies in State court. Meaningful access to the courts requires more than the empty formality of an unenforceable order. The panel incorrectly held that the availability of other remedies means that the Plaintiffs were not denied access to the courts.

In order to constitute a valid plain view seizure, property must be discovered inadvertently. An officer who intentionally searches for property in a specific location because he has probable cause to believe it is there does not inadvertently discover that property. The panel

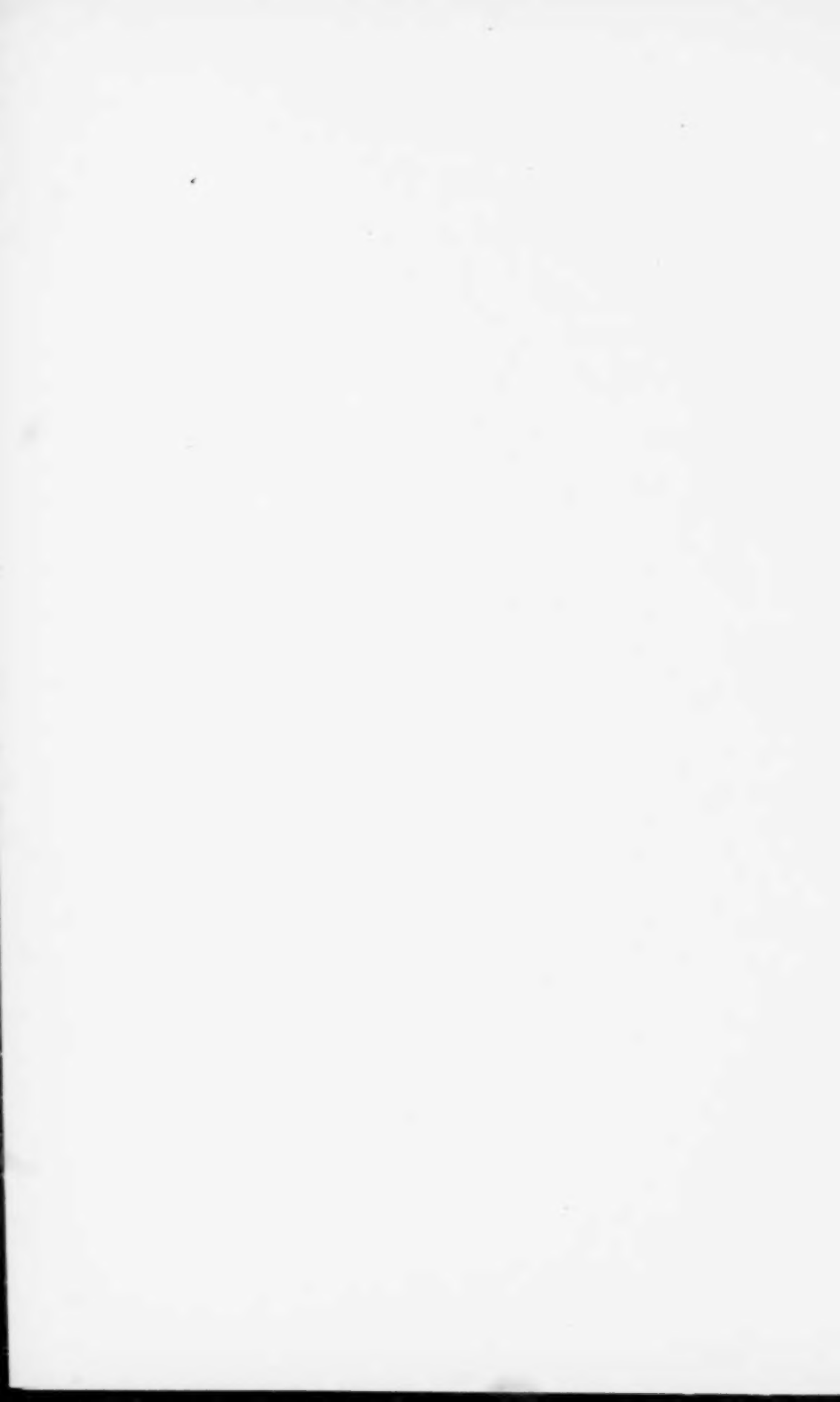


incorrectly rejected the subjective intent of the officers, and incorrectly held that no Fourth Amendment violation can occur due to successive searches in the same places in order to seize different property.

A reasonable police officer in January, 1981 would have known that a search for and seizure of property not listed in a warrant violated the Fourth Amendment to the United States Constitution. Subsequent changes in the law do not render that principle unclear after the fact. The panel erred in holding that the individual Arkansas officers are qualifiedly immune from liability as a matter of law.

Respectfully Submitted,

MARY L. SINDERSON



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari were forwarded to Mr. William Bullock, attorney for all defendants except Charles Lambert, and to the Attorney General for the State of Arkansas, attorney for defendant Charles Lambert, by depositing same, postage prepaid, in the United States Mails on the 12th day of February, 1990.

MARY L. SINDERSON



App. A: OPINION AND JUDGMENT Of the
United States Court of Appeals for the
Fifth Circuit, rendered September 21,
1989.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-2049

NO. 87-2455

NANCY CROWDER, Individually and as
Independent Executrix of the Estate of
JAMES RALSTON CROWDER,

Plaintiff-Appellee,
Cross-Appellant,

VERSUS

KEN SINYARD, et al.,

Defendants-Appellants
Cross-Appellees.

NANCY CROWDER, Individually and as
Independent Executrix of the Estate of
JAMES RALSTON CROWDER,

Plaintiff,

VERSUS

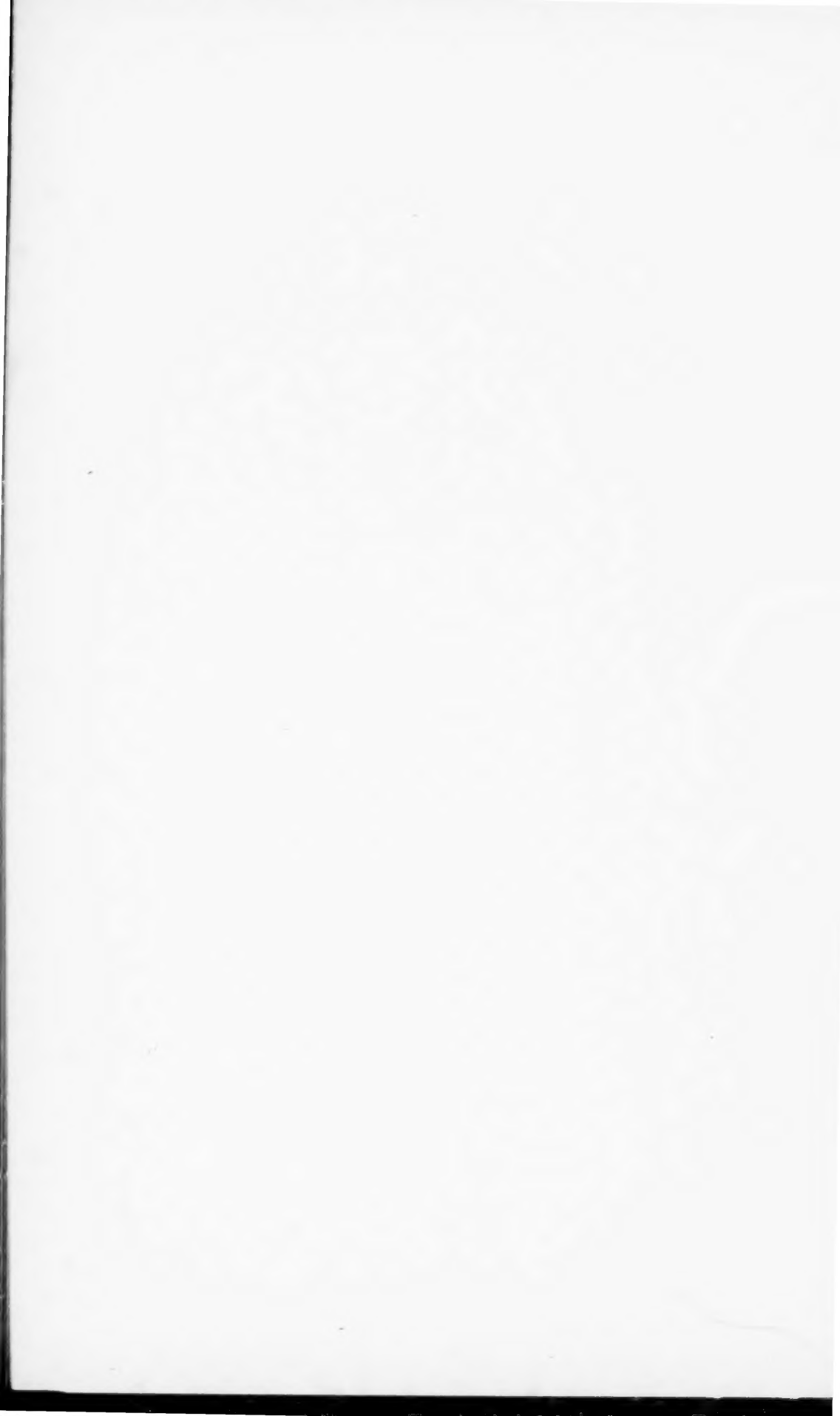
KEN SINYARD et al.

Defendants-Appellees,

VERSUS

WINSTON P. CROWDER

Appellant.



Appeals from the United States District
Court for the Eastern District of Texas

(September 21, 1989)

Before GARWOOD, JONES, and SMITH, Circuit
Judges.

JERRY E. SMITH, Circuit Judge:

The primary issue in these consolidated appeals is whether the actions of various law enforcement officers and prosecutors in executing a search warrant and seizing certain pieces of personal property violated the Crowders' ^{1/} first, fourth, and fourteenth amendment rights. After a jury trial the district court rendered judgment in favor of the Crowders and awarded attorneys' fees.

^{1/} Although the suit was filed on behalf of both James Ralston Crowder and Nancy Crowder, Mr. Crowder has since died. His wife thus proceeds in both her individual capacity and as executrix of her husband's estate; for the sake of convenience, we sometimes refer to the plaintiffs collectively, although there is technically now only a single plaintiff proceeding in two capacities.



These appeals followed. In No. 88-2049, all of the defendants that were held liable appeal from the judgment; as to that appeal, we vacate and remand. The Crowders cross-appeal on the ground that the district court erred by granting a judgment notwithstanding the verdict in favor of one of the governmental defendants; as to that cross-appeal, we affirm. In No. 87-2455, one of the Crowders' attorneys appeals, arguing that the district court erred in rejecting much of his claim for attorneys' fees. We dismiss that appeal as moot.

I.

A. In the course of investigating a series of burglaries in southwest Arkansas in December 1980 and January 1981, law enforcement officials from Sevier County, Arkansas, and the City of DeQueen, Arkansas, a city in Sevier County, apprehended Terry Broyles in

DeQueen. On the morning of January 27, 1981, Sevier County Sheriff David Godwin and DeQueen Chief of Police Bill Jones took Broyles to the Arkansas State Police headquarters in Hope, Arkansas, for a polygraph examination.

While they were there, Godwin spoke with H. L. Phillips, a Miller County, Arkansas, Deputy Sheriff, who told him that a number of similar burglaries had occurred in Miller County. Phillips asked for, and received permission to speak with Broyles, who implicated one Jay Wilson as the perpetrator of the Miller County burglaries. Phillips also indicated that Wilson had a relative named J. R. (Jimmy) Bradshaw who was involved in the burglaries.

After the officers learned that Bradshaw was already in custody in Texarkana, Texas, on unrelated charges, the three officers decided to continue their

investigation by taking Broyles to Texarkana, about thirty miles from Hope. Two other Arkansas officials -- Charles Lambert, an Arkansas State Police investigator who had been assisting the Miller and Sevier County Sheriff's Offices in investigating the burglaries, and State Trooper R. W. Neal -- also decided to go to Texarkana.

That same day the officers -- Godwin, Jones, Phillips, Charles Lambert and Neal -- all met at the Texarkana, Texas, Police Department Criminal Investigation Division (CID) headquarters at about 5:00 p.m. While the other four officials questioned Bradshaw, Jones took Broyles to Miller County for separate questioning by Miller County Deputy Sheriff Allen Jordan. Both men told similar stories, indicating that they had burglarized residences in Miller, Sevier, and Pike Counties in Arkansas



and, on numerous occasions and under questionable circumstances, had sold stolen jewelry and silverware to James Ralston Crowder at the J. R. Crowder Insurance Agency in Texarkana, Texas.

On the basis of this information Sgt. Gary Adams, the ranking on-duty officer of the Texarkana, Texas, CID, determined that probable cause existed to search the insurance agency for such stolen property. Adams contacted the Bowie County, Texas, Criminal District Attorney's Office and asked it to review his determination and assist in preparing an affidavit for a search warrant. Bowie County District Attorney Louis Raffaelli told Assistant District Attorney James Elliott to go to CID headquarters to assist Adams.

Elliott arrived at CID headquarters at about 9:00 p.m. After speaking with Adams and the other officers and person-

ally confirming with Broyles and Bradshaw what they had told the officers, Elliott concluded that there was probable cause only to search Crowder's office for those stolen items most recently sold to Crowder, as only those items would still likely be on the premises.

Elliott then drafted an affidavit to be signed by Phillips for a search warrant. The affidavit was based primarily upon information obtained from Broyles regarding two robberies that had occurred in the preceding week; it listed five items to be searched for and seized ^{2/} After reviewing the signed

^{2/} The affidavit reads, in pertinent part:

The undersigned affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:

1. There is in Bowie County, Texas, a suspected place and premises described and located as follows: A one story beige



brick office building located at 615 Olive, in the City of Texarkana, Texas. Located in front of the building is a large sign bearing the inscription J. R. Crowder Insurance.

2. There is at said suspected place and premises personal property concealed and kept in violation of the laws of Texas and described as follows: One round pocket watch Elgin on face; One coin collection consisting of gold and silver American and foreign coins 25 or 30 of which are in [sic] plastic packets; One indian [sic] head penny, gold plated; One money clip with dollar sign on it; and one piece of paper, kept in his desk in his office on which are certain figures (\$500 minus sums of \$10 and similar sums) which said paper is used to keep an account of a sum of money owed by Jimmy Bradshaw to J. R. Crowder for the sale of stolen property.

.

4. It is the belief of AFFIANT and he hereby charges and accuses that: Two individual [sic] named Terry Boyles [sic] and Jimmy Bradshaw have sold numerous items acquired by theft to J. R. Crowder at the residence listed in paragraph number one in this Affidavit for Search

and Arrest; Affiant believes that J.R. Crowder is possessing these items in violation of Penal Statute 31.03 Texas Penal Code, and such offense occurred in Bowie County, Texas.

5. AFFIANT has probable cause for said belief by reason of the following facts: Affiant Miller County Deputy Sheriff H. L. Phillips is employed by the Miller County Sheriff's Department and is currently assigned to working cases involving crimes committed by Terry Boyles and [sic] and Jimmy Bradshaw. The said Terry Boyles [sic] is presently in the custody of the Miller County Sheriff's Office and is being held for the charge of breaking and entering and theft over \$100.00. On this date, January 27, 1981, Terry Boyles signed a Written voluntary statement (a copy of which is attached hereto as Exhibit A and is by this reference is [sic] incorporated herein for all purposes) in which he admitted that he [sic] stole numerous items, part of which are listed [sic] in paragraph 2 of this affidavit [sic]; and sold them to J. R. Crowder at the office building located at 615 Olive in the city of Texarkana, Texas, on the 23rd of January 1981.

Terry Boyles [sic] further related that

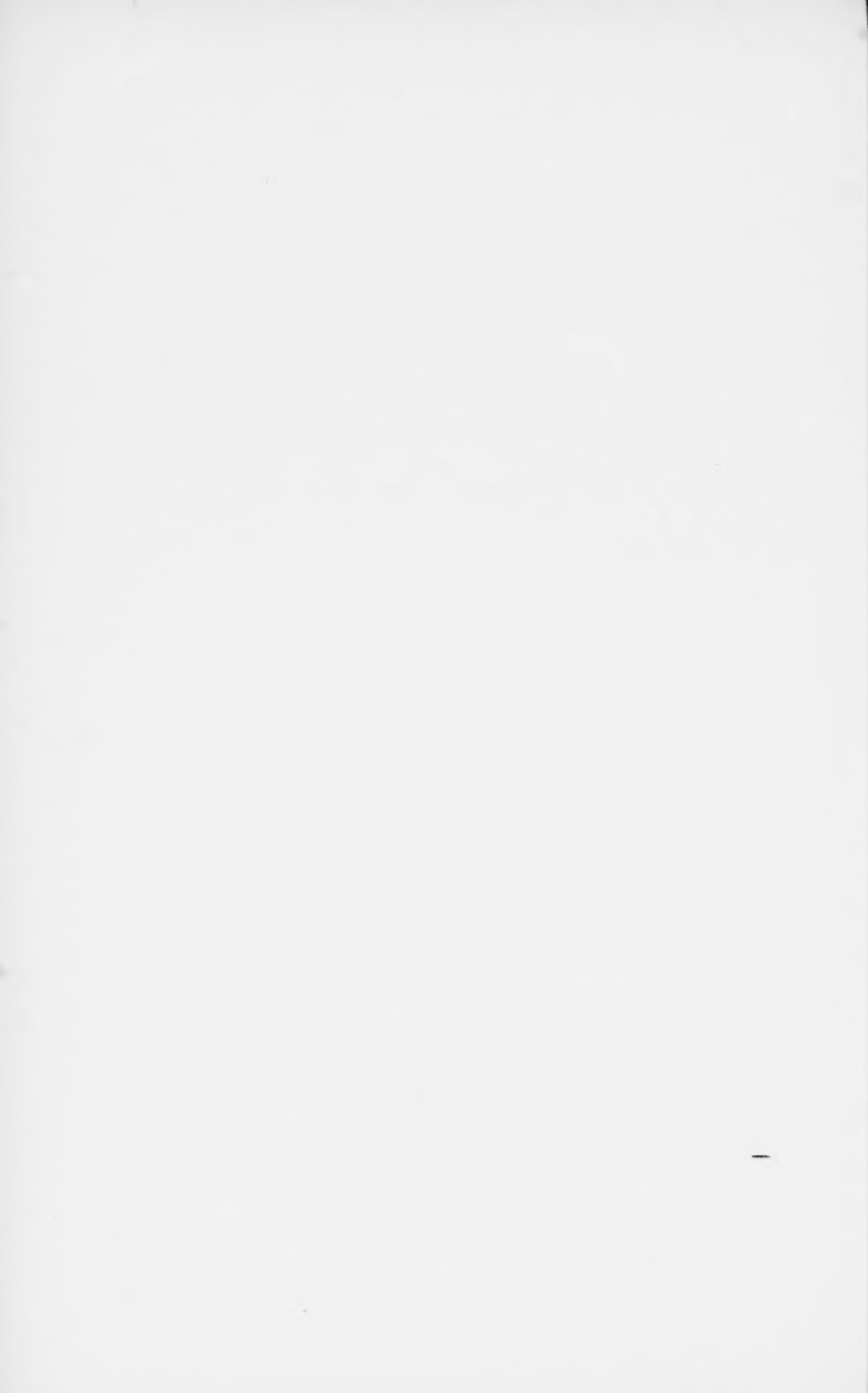
affidavit a magistrate executed a form warrant authorizing a search of the agency for the specified items and the arrest of Crowder.^{3/}

Adams, accompanied by Detective Louis Aycock of the Texarkana, Texas CID and the two suspects (Bradshaw and Broyles), drove to Crowder's home to obtain his assistance in gaining entry to his office. After Crowder identified Bradshaw and Broyles as persons with whom

there is a sheet of paper kept in a desk at this office on which are certain figures (\$500 minus sums of \$10 and similar sums), which said paper is used to keep an account of a sum of money owed by Jimmy Bradshaw to J. R. Crowder for the sale of stolen property.

Attached to the warrant was a signed statement from Broyles indicating that he and another suspect had sold stolen "silver and gold items" to Crowder on January 23, 1981.

^{3/} Although the form warrant authorized the arrest of Crowder as well as a search of his offices, the jury found that he was not arrested and this finding is not challenged on appeal.



he had done business, he complied with the officers' request or instruction that he accompany them to the insurance agency for the execution of the search warrant.

Crowder, Adams and Aycock entered the insurance agency at approximately 11:30 p.m. Shortly thereafter, and at Adams's request or invitation they were joined by all of the following Arkansas officers: Miller County Sheriff Ken Sinyard, Jordan, Phillips, Godwin, Jones, Charles Lambert and Neal. ^{4/} Raffaelli and Elliott, who went to the agency but did not enter it at this time, remained in a parked car for a short while and then left to perform a personal errand.

A three-hour search of the agency

^{4/} At some point during the search, the officers were also joined by Donald Lambert, an agent with the Federal Bureau of Investigation (FBI). The extent of his involvement in the search and seizure is unclear; in any event, as the jury did not find him liable, and the plaintiffs do not appeal this finding, we need do no more than note his presence.



ensued. After being informed, at least partially, of the items mentioned in the warrant Crowder went to his desk and pulled out a sheet of paper resembling the document described in the affidavit. At various officers' request or instruction Crowder opened several heavy locked file cabinets from which the officers collected jewelry, coins and other items; various officers also searched for and seized items found in several desks and a footlocker. At one point or another each of the officers participated in the search and seizure by looking into the file cabinets, the footlocker, or the desks and inspecting the objects in the room. 5/ Four of the seized items were

5/ The extent of participation by Raffaelli and Elliott is more difficult to discern. The evidence establishes that after they returned from their personal errand they entered the agency and were present for the last 60 to 90 minutes of the search. There is no evidence that either of them actively participated in the search, although several of the



described in the search warrant, but most were not. Rather, the officers testified that they seized the items because they matched the description of items taken in other burglaries in Sevier and Miller Counties. 6/ Ultimately, forty-six untagged items were deposited in a sack and removed to CID headquarters. The search ended abruptly when at approximately 2:30 a.m. Crowder's attorney

officers testified that Elliott was the person "in charge" of the night's events. Elliott also rendered legal advice to the officers to the effect that they should not seize a particular coin collection and pearl necklace found in one of the file cabinets; similarly, at one point Raffaelli prohibited the officers from seizing gold and silver ingots that the officers suspected had been refined from stolen property.

6/ The testimony establishes that during the search, Phillips and Jones consulted lists containing information regarding property taken in burglaries other than those upon which the affidavit was based. Similarly, Godwin testified that he was "hunting big silver" taken in two Sevier County burglaries not mentioned in the affidavit.



arrived at the agency in the company of a private investigator with a video camera. The attorney began to ask questions regarding the search and seizure and disposition of the untagged items. All of the officers quickly left the premises; Raffaelli and Elliott stayed on the scene long enough to inform the attorney that any questions he had could be raised at a judicial hearing the next day, as provided in the Texas Code of Criminal Procedure.

Back at CID, Phillips and Aycock inventoried the seized property. Pursuant to Sinyard's request, Aycock, after consulting with Raffaelli, agreed to release the property to Miller County officials. Early that morning Phillips signed a receipt for the property and took it to Miller County.

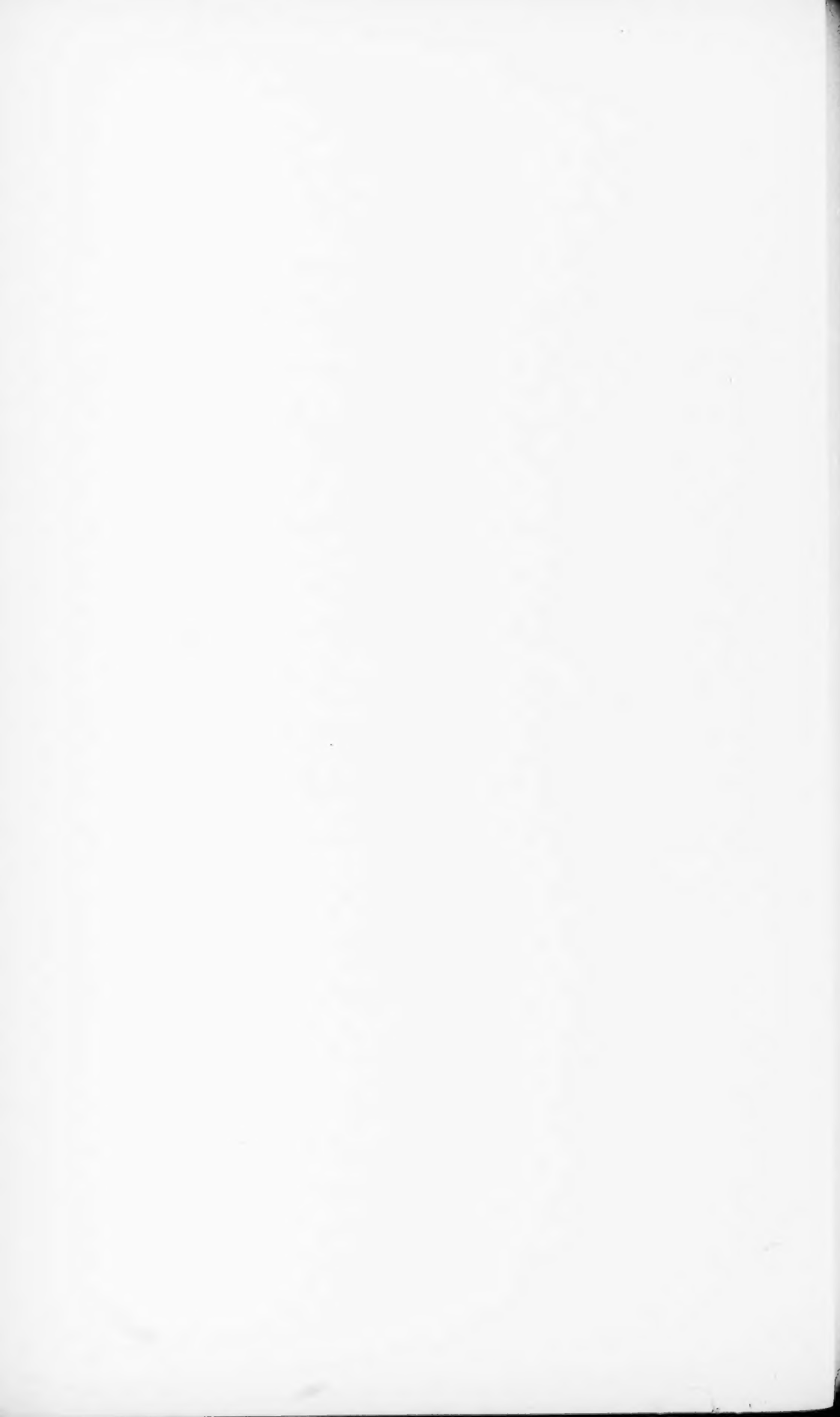
B. On or about February 1, 1981, Crowder filed a petition in Texas state

court against Raffaelli, Elliott, Donald Lambert, Aycock and "other persons unknown." Crowder sought to have the court order the defendants to deposit the seized property into the registry of the court pending a determination of the legality of the search and seizure and of Crowder's entitlement to the property. After a hearing, the court issued such an order. The defendants appealed the order to a Texas intermediate appellate court which dismissed the appeal on the ground that it lacked jurisdiction to hear an appeal from an order that only compelled a party to place property into the registry.

In an attempt to comply with the court's order, the Texas officials -- Raffaelli, Elliott, and Aycock -- contacted the Miller County Sheriff's office and requested the return of the property. However, acting under legal advice,

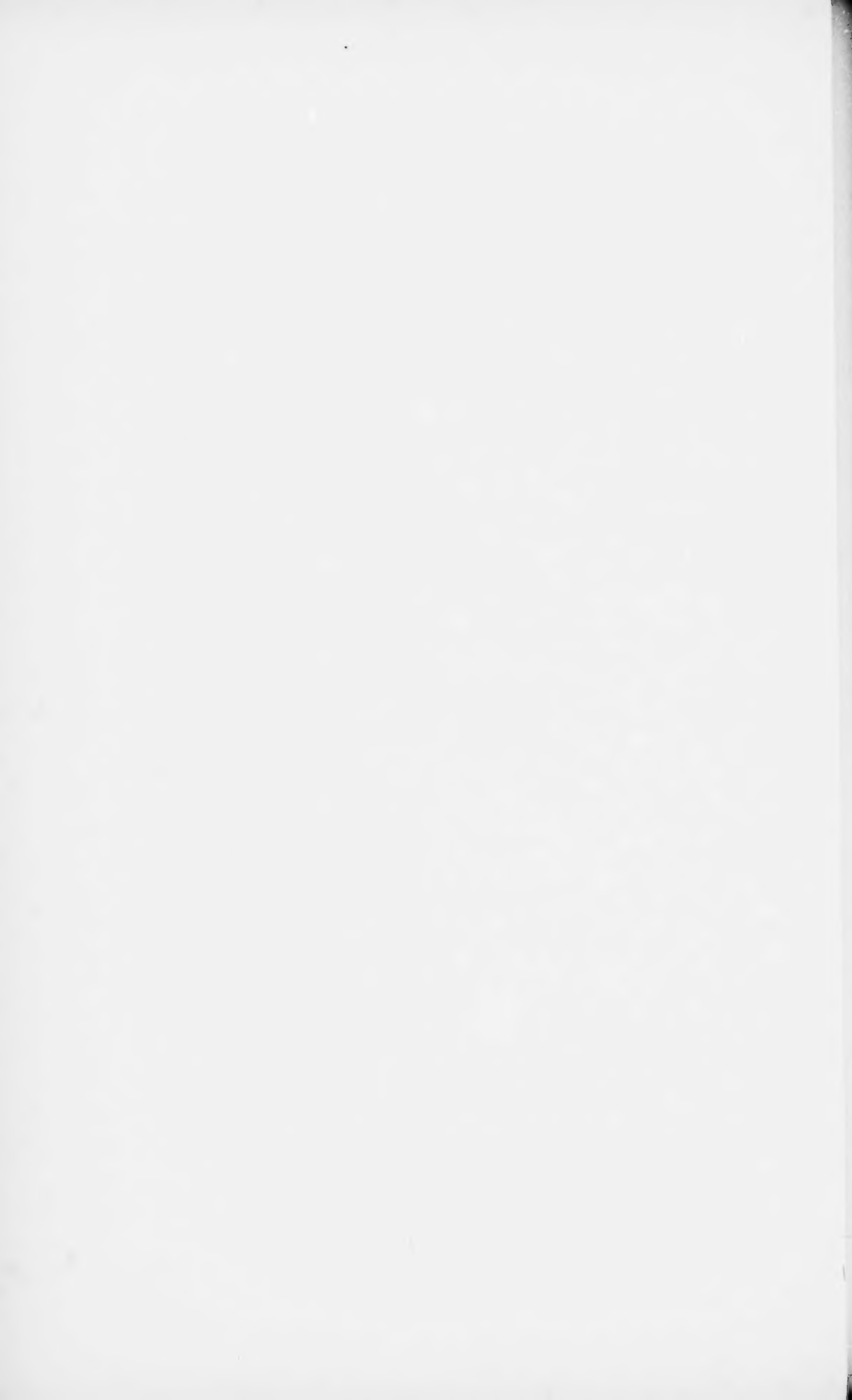
Miller County officials refused to comply. Moreover, as Crowder had failed to join the Miller County officials as defendants, the Texas state court could not compel them to turn over the property. No further proceedings took place in state court.

C. Crowder and his wife filed suit under 42 U.S.C. § 1983 against every person involved in the search and their respective governmental entities. By the time the case went to trial, the Crowders were asserting two theories of liability: (1) that the defendants violated their constitutional right of access to the courts by allowing the seized property to be removed from Texas; and (2) that the defendants violated their fourth amendment rights by carrying out an unreasonable search and seizure. The individual defendants, in addition to denying the existence of any violations, also sought



to prove at trial, inter alia, that they were entitled to qualified immunity from liability under Harlow v. Fitzgerald, 457 U. S. 800 (1982).

The case went to trial before the Honorable William Wayne Justice. The jury answered forty-four special interrogatories regarding various factual issues in the case. Interpreting the jury's answers, the Court found that none of the defendants was entitled to qualified immunity; that Sinyard, Phillips, Jordan, Adams, Raffaelli, Elliott, Campbell, Miller County, Bowie County, and the City of Texarkana were all liable for violating the Crowders' right of access to the courts; and that Sinyard, Phillips, Godwin, Jones, Charles Lambert, Miller County, Sevier County, and the City of DeQueen were liable for violating the Crowders' fourth amendment rights. After granting Campbell's and the City of



Texarkana's motions for judgment notwithstanding the verdict (j.n.o.v.), the court entered judgment against the remaining defendants it had found liable and, under 42 U.S.C. § 1988, awarded the Crowders attorneys' fees.

The parties against whom judgment was entered appeal on numerous grounds; the Crowders cross-appeal, arguing that the court erred by granting the City of Texarkana's motion for j.n.o.v. In a related appeal, one of the Crowders' attorneys contends that the court erred by awarding him an inadequate amount of attorneys' fees.

II.

The defendants found liable for violating the Crowders' constitutional right of access to the courts contend that as a matter of law their actions did not violate that right. We agree.

A.

Although judicial recognition of the constitutional right of access to the courts occurred long ago, ^{7/} the current contours of the right can best be described as nebulous. If for no other reason, this is because much of the development of the right has occurred in the prison context where state officials

^{7/} The origins of the right can be traced to Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 148 (1907):

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . .

Although this discussion of the right took place in the context of the privileges and immunities clause of article IV, section 2 of the Constitution, the right has also been said to derive from the due process clauses of the fifth and fourteenth amendments and the right of petition found in the first amendment. See generally Ryland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983)(citing cases).



have the capability of exercising both direct and indirect control over the litigation activities of incarcerated individuals. It is thus to these cases that we turn first for instruction, although they are of limited use in this case.

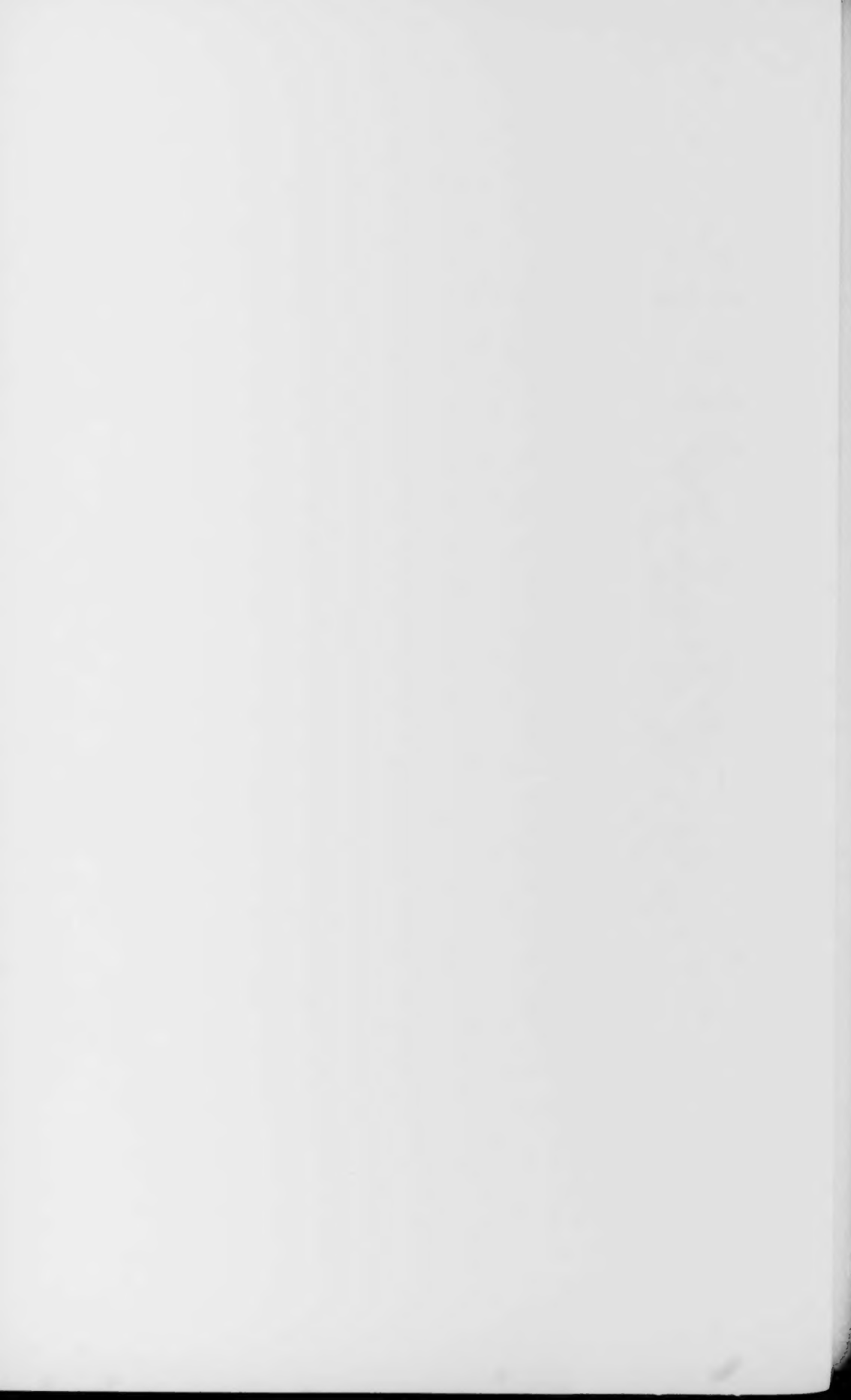
(1) In its most obvious and formal manifestation, the right protects one's physical access to the courts. Thus, for example, prison officials cannot refuse to transmit or otherwise block through procedural devices the transmission of legal documents which prisoners wish to send to the courts. See Ex Parte Hull, 312 U.S. 546 (1941) (striking down a state regulation prohibiting prisoners from filing petitions for habeas corpus without the approval of a state official); Jackson v. Procunier, 789 F.2d 307, 310-11 (5th Cir. 1986) (prison officials may not deliberately delay

mailing legal papers when they know that such delay will effectively deny a prisoner access to the courts). Nor can they take other actions -- such as taking or destroying legal papers -- that have a similar effect. See Houston v. Lack, 108 S.Ct. 2379 (1989); Morello v. James, 810 F.2d 344, 346 (2d Cir. 1987); Sigafus v. Brown, 416 F.2d 105, 107 (7th Cir. 1969).

(2) As we have pointed out, however, our cases also stand for the proposition that

[a] mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective and meaningful.'

Ryland v. Shapiro, 708 F.2d at 972 (quoting Bounds v. Smith, 430 U.S. 817, 822 (1977)). Thus the constitutional right of access to the courts prohibits prison officials from unreasonably limiting access to legal personnel or



other prisoners who can provide legal advice. See Procunier v. Martinez, 416 U.S. 396, 419-22 (1974), overruled on other grounds, Thornburgh v. Abbott, 109 S.Ct. 1874 (1989); Johnson v. Avery, 393 U.S. 483, 490 (1969).

(3) Not all aspects of the constitutional right of access to the courts are prohibitory in nature; for example, the right requires that prison officials "provid[e] prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828. Similarly, courts have required that prison officials provide indigent prisoners with drafting materials and postage. Id. at 824-25; Chandler v. Coughlin, 763 F.2d 110, 114-15 (2d Cir. 1985).

In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary



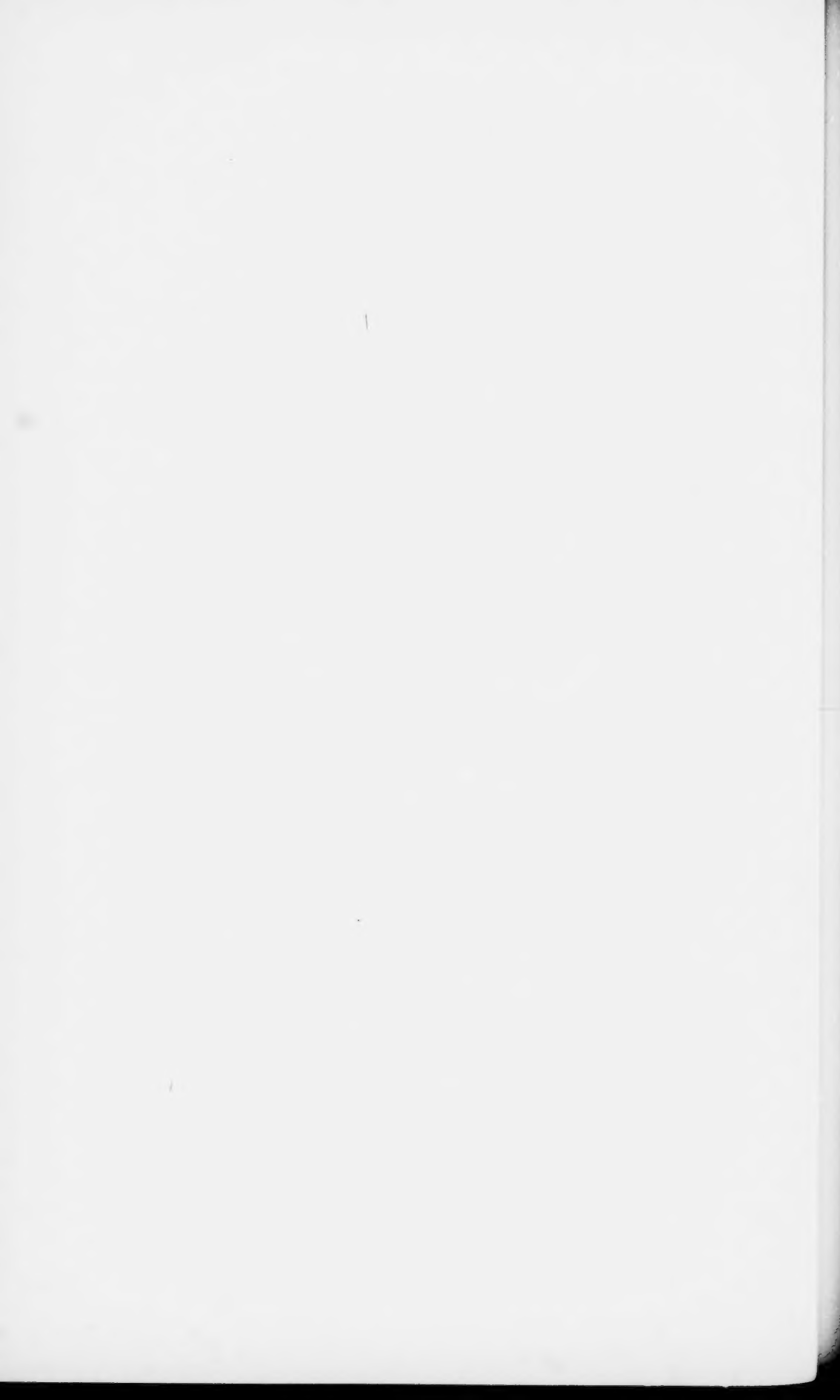
individuals do not find any physical barriers between them and the courts. To file a complaint or legal paper, they need merely to travel to the courthouse or even just the nearest mailbox; to obtain legal advice, they need only travel to a lawyer's office or the nearest law library or pick up the telephone. If the constitutional right of access has any sweep outside the prison context, therefore, it must be based upon a more nuanced interpretation of the requirement that such access be "adequate, effective, and meaningful."

One such interpretation has been offered by our court in Ryland v. Shapiro. In that case, the parents of a murder victim filed an action under 42 U.S.C. § 1983 against several state prosecutors, alleging that two of them engaged in a cover-up of the fact that a murder had occurred and that the murderer



was Shapiro, a fellow prosecutor. Their claim was that, by concealing such facts for a period of eleven months the defendants caused them to delay bringing a wrongful death action against the murderer, and thus "wrongfully interfer[ed] with their access to the state courts to pursue their tort claim." 708 F.2d at 970. The district court, viewing their complaint as alleging that the defendants failed to enforce the criminal laws of Louisiana, dismissed for lack of standing.

(4) We reversed, holding that the district court had failed to consider the legal theory -- deprivation of their constitutional right of access to the courts -- advanced by the Rylands, a claim for which, we concluded, they did have standing. We then proceeded to address the sufficiency of the complaint. The delay created by the defendants, we

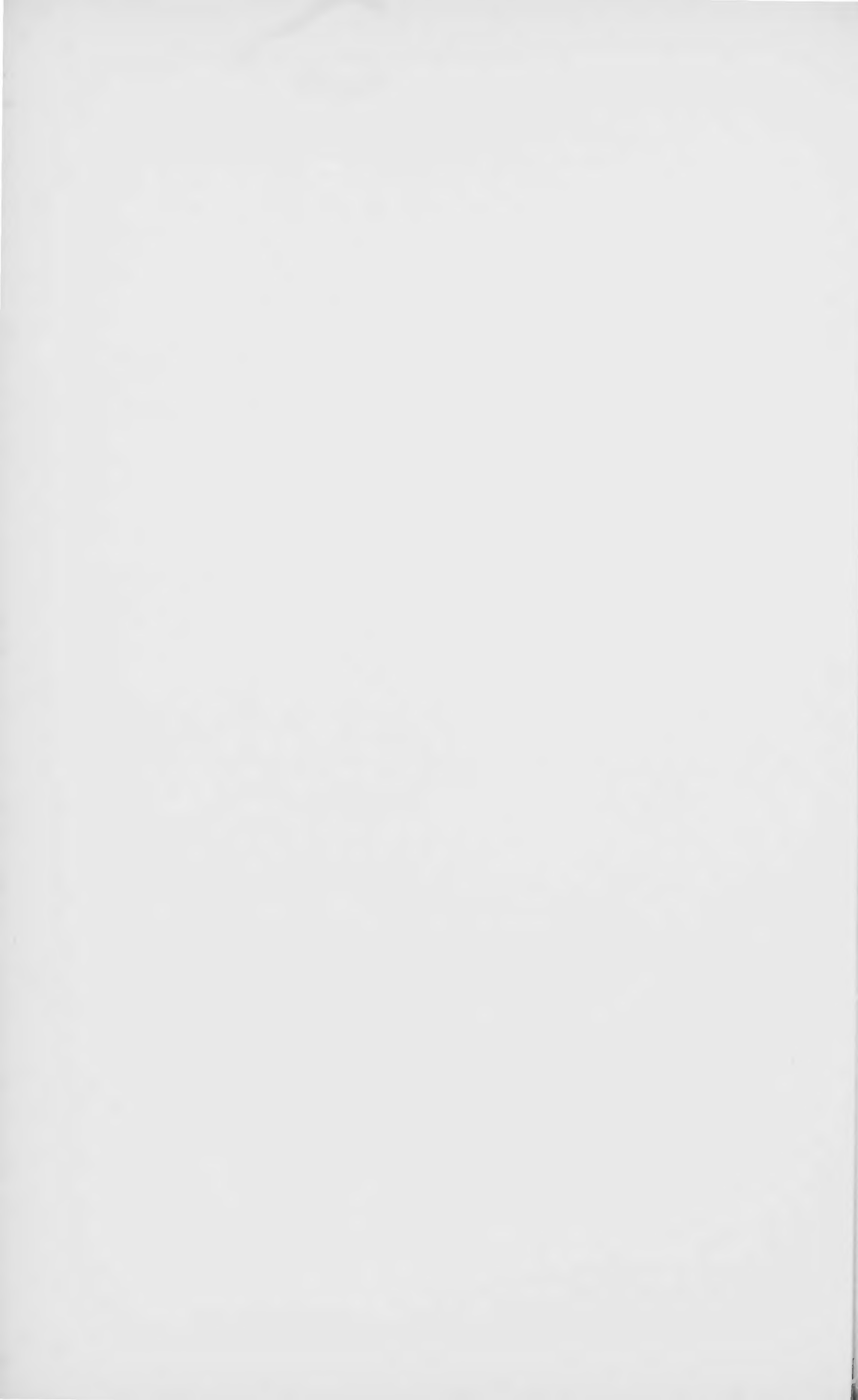


concluded, could constitute a constitutional deprivation of the Rylands' right of access to the courts if they could make a showing of prejudice:

Applying these principles to our case, we cannot say with certainty that there is no possibility that any set of facts which might be proved in support of the allegations would entitle the Rylands to some relief The defendants' actions could have prejudiced the Rylands' chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses. Moreover, it could well prove more expensive to litigate such action.

Id. at 974-75. 8/ On its facts, there-

8/ The Ryland court also surmised without citation to authority, that "any interference with a substantive constitutional right, such as the right of access to the courts, may by itself amount to a constitutional deprivation (unless reasonably justified by a countervailing state interest)." 708 F.2d at 975. We interpret this sentence as merely re-emphasizing the point that if a plaintiff proves that his constitutional right of access to the courts has been violated, a constitutional deprivation has occurred



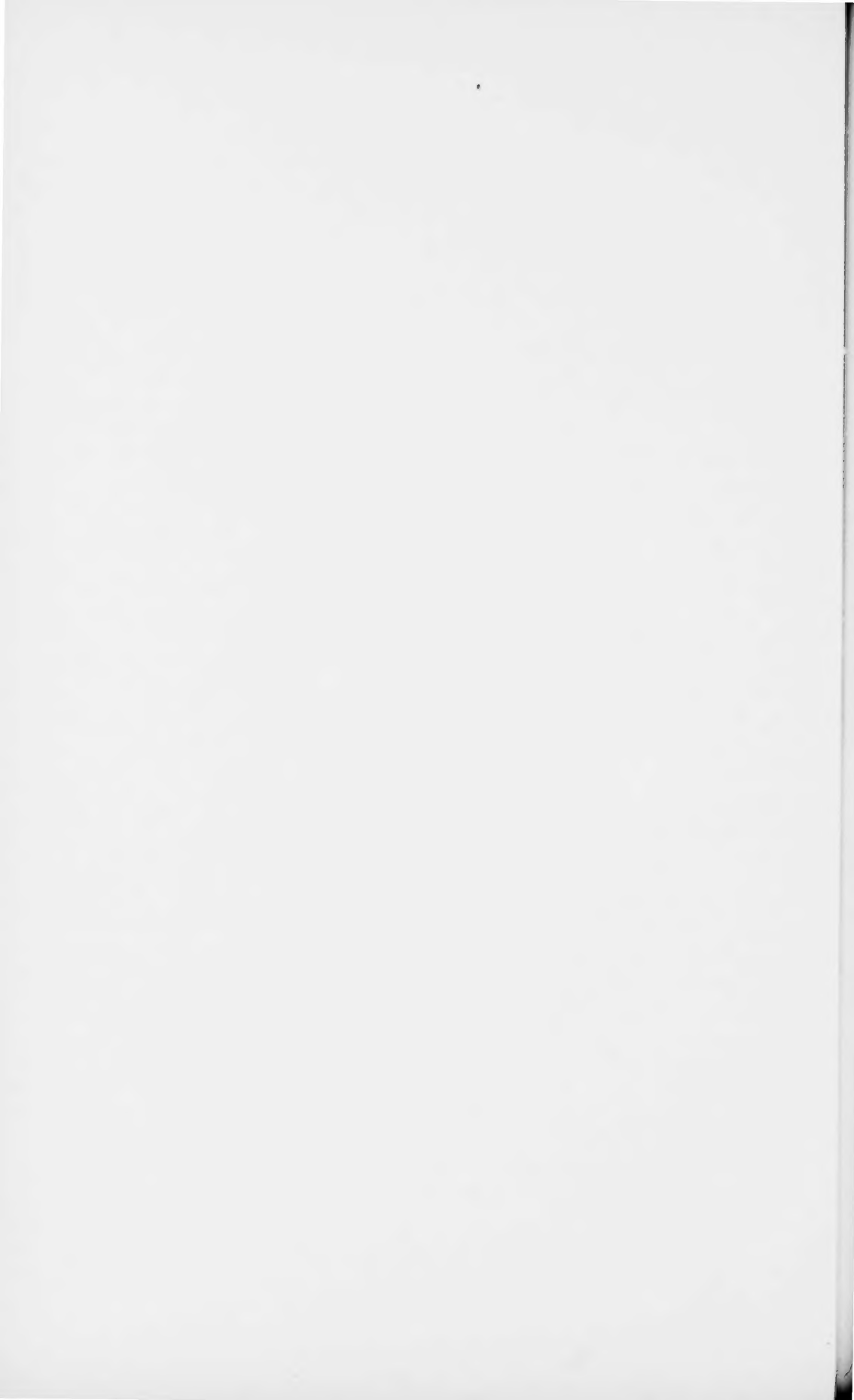
fore, Ryland stands for the proposition that if state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts and do so for the purpose of frustrating that right, and

and he or she will have a cause of action under § 1983 against those state actors causing the deprivation. Any other reading of the sentence renders it inconsistent with long-established constitutional precedents that recognize that "interference" and "violation" are entirely different concepts. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, ___, 108 S.Ct. 1319, 1324 (1988) ("It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects upon the practice of their religion. Respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in their harvesting in the Chimney Rock area. We disagree."). We are still left with the question, however, of what constitutes a violation of the constitutional right of access to the courts, a question which Ryland answers by requiring a showing of prejudice.



that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation. 9/

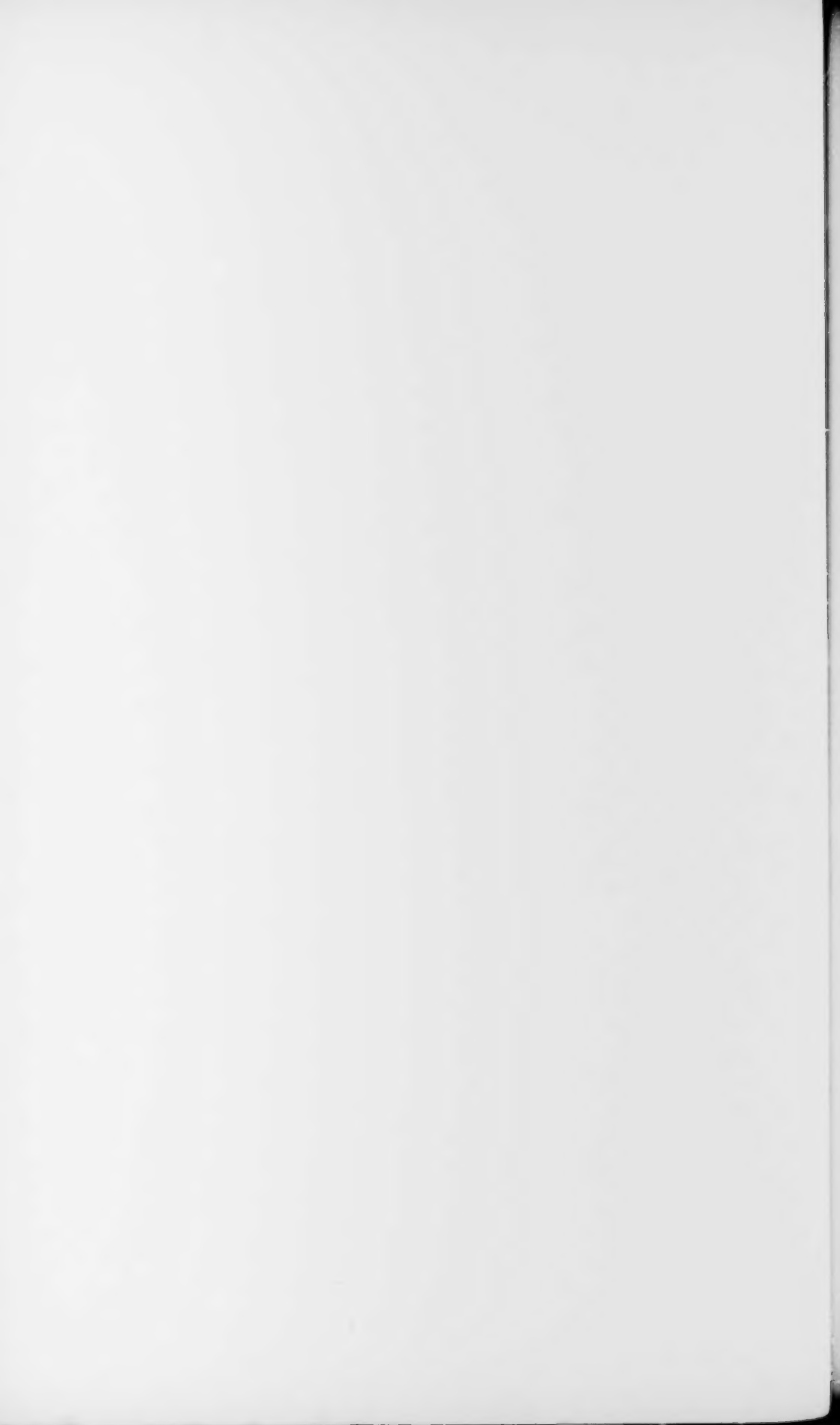
9/ Other courts considering official cover-ups similarly have held that a showing of substantial prejudice to the plaintiff's rights is required. See Bell v. City of Milwaukee, 746 F.2d 1205, 1260-61 (7th Cir. 1984) (police officers could be found liable for concealing from a murder victim's family key facts that would form the basis for redress); Agresta v. Sambor, 687 F.Supp. 162, 167 (E.D.Pa. 1988) (same); Germany v. Vance, 673 F.Supp. 1143, 1149 (D.Mass. 1987) (state officials who failed to inform then-incarcerated minor that key witness had recanted testimony may be sued for violating her right of access to the courts insofar as "failure to disclose facts which are essential to an incarcerated individual's claim for relief may be more effective in denying access to the courts than destroying court papers or limiting access to the mail") (footnote omitted), aff'd in part, rev'd n part, 868 F.2d 9 (1st Cir. 1989). Cf. Howland v. Kilquist 833 F.2d 639, 642 (7th Cir. 1987) (in the context of pro se prisoner litigation, stating that "some showing of detriment caused by the challenged conduct must be made in order to succeed on a claim alleging a deprivation of the right to meaningful access to the courts" (citations omitted)).



B.

(5) It is immediately apparent that the Crowders must urge us to break new ground in this area of the law, as they allege neither cover-up or retaliation. We decline their invitation, holding that no violation of the constitutional right

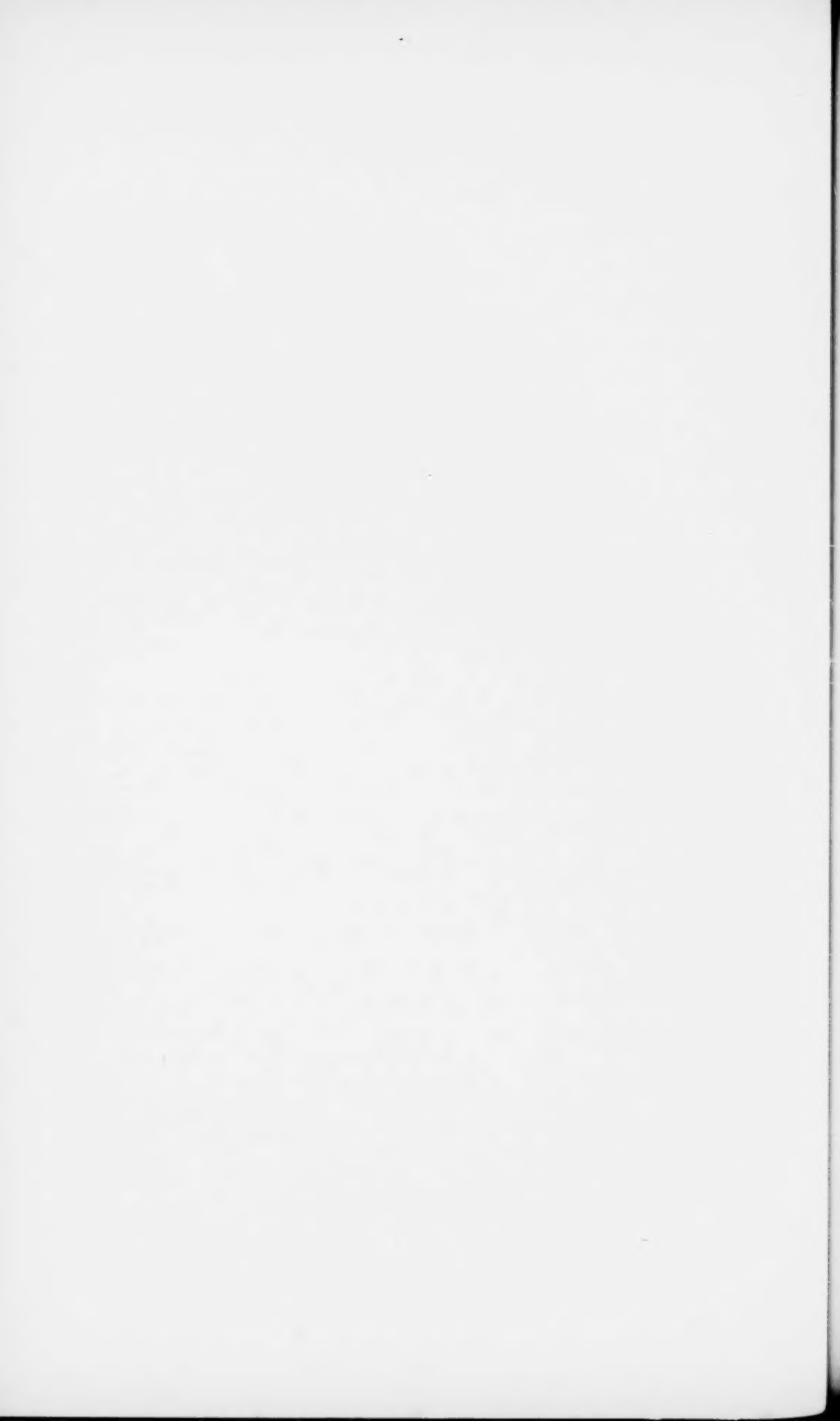
There is a final category of cases as to which the courts have found the constitutional right of access to the courts to be implicated. Drawing again from the prison context courts have held that if state officials in some way retaliate against an individual for seeking redress through the courts, they have violated that person's right of access to the courts. See Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1428 (8th Cir. 1986) (plaintiffs who contend that state officials filed a frivolous condemnation counterclaim in order to force the plaintiffs to settle a nuisance lawsuit against the Commission and sell their property have stated a claim for infringement of their constitutional right of access to the courts). Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("A public official's threats to a citizen to withhold monies due and owing should legal proceedings on an independent matter be instituted, burdens or chills constitutional rights



of access to the courts occurred in this case.

The essence of the Crowders' theory on this issue is that by causing or allowing the property seized during the search to be physically removed to Arkansas, the defendants interfered with the Crowders' ability to use the Texas court system to recover the property. The defendants' actions, as the district court reasoned in its memorandum opinion, "destroyed or impaired the rightful jurisdiction of Texas courts over the seized items, thus interfering with [the Crowders'] ability to litigate ownership

of access to the courts."). We cite these cases as general background and do not have occasion to approve or disapprove of their respective holdings.



of the property in Texas." 10/

10/ According to the Crowders, the statutory procedures governing the disposition of seized property contemplate that the court will have jurisdiction over the res. At the time of the seizure, Tex. Code Crim. P. art. 47.01 provided that "[a]n officer who comes into custody of property alleged to have been stolen must hold it subject to the order of the proper court or magistrate." Cf. id. art. 18.11 ("When a warrant has been issued to search a suspected place and there be found any property as alleged to have been there kept or concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate (who issued the warrant)."). In turn Tex. Code Crim P. art. 47.01a provided that

[i]f no criminal action is pending a magistrate of the county or city in which the property is being held may hold a hearing to determine the right to possession of the property upon the petition of any interested person. The magistrate shall order the property delivered to whoever has the superior right to possession, subject to the condition that the property be made available to the prosecuting authority should it be needed in the future, or the magistrate may remand the property to the custody of the peace officer.

The Crowders contend that the purpose of the two provisions commanding the seizing



officer to "safely keep" the property is to ensure that the magistrate, in order to effect fully his powers under art. 47.01a, will have jurisdiction over the res. By preventing the magistrate from exercising direct power over the property, they contend, the defendants interfered with the Crowders' ability to use the Texas court system to litigate their rights to the seized property.

Shortly after these events the Texas Legislature amended arts. 18.10 and 18.11 to provide that, inter alia,

[t]he officer who seized the property shall retain custody of it until the magistrate issues an order directing the manner of safekeeping the property. The property may not be removed from the county in which it was seized without an order approving the removal issued by a magistrate in the county in which the warrant was issued; provided, however, nothing, herein shall prevent the officer, or his department, from forwarding any item or items seized to a laboratory for scientific analysis.

Tex. Code Crim P. art 18.10 (1989 Supp.) (eff. Sept. 1, 1981). In 1987 the Legislature also amended art. 47.01a. See Tex. Code Crim. P. art 47.01a (1989 Supp.) (eff. Aug. 31, 1987). As the events underlying the Crowders' claim took place in January and February 1981, these amendments are irrelevant to our analysis.



Although we agree that the removal of the seized property to Arkansas may have complicated in some way, the Crowders' efforts to use the Texas judicial system to test the legality of the search and seizure or to recover the property, we cannot agree that the defendants' actions violated the Crowders' constitutional right of access to the courts. Contrary to their claims, "adequate, effective, and meaningful" access appears to have been available to them under Texas law; responsibility for their failure to utilize such access effectively cannot be placed upon the defendants.

That the Crowders had "access" to the Texas courts cannot be denied. Within a few days after the search, they brought their grievances before such a court, which, exercising its jurisdiction under Texas law, heard those grievances.



Moreover, they obtained precisely the initial relief sought in their petition: an injunction ordering the Texas defendants to transfer the property into the registry of the court pending a determination as to the propriety of the search and seizure. The question in this case is thus not one of "access"; rather it is whether that access was "adequate, effective, and meaningful."

As an initial matter, we find it difficult to understand how the Crowders can contend that, having received all of the relief requested in state court, their access to relief there was nonetheless "obstructed" such that a denial of their constitutional rights occurred. The right of access to the courts is what may be described as a facilitative right; it is designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable



claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief. That is precisely what has occurred in this case.

The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural posture or the right to a particular form of relief. We thus see no significance in the fact that the defendants' actions, by depriving the state court of jurisdiction over the res, eliminated the possibility that it could exercise direct control over the property. Effective legal redress was nonetheless available to the Crowders.

As both the Crowders and the district court conceded, for example, the Crowders could have amended their petition to add all of the Arkansas



officials as defendants under the Texas Long Arm Statute, Tex.Civ.Prac. & Rem. Code arts. 17.041- 17.045, insofar as they could be characterized as tortfeasors whose offending acts -- participating in the seizure and obtaining allegedly unlawful possession of the property -- occurred in Texas. ^{11/} Had the Crowders done this, the full panoply of the Texas state court's powers would have extended to the persons in actual possession of the property thus greatly increasing the court's ability to obtain physical control over the property.

Although we do not resolve the question here, we also have no reason to believe that the Crowders did not have an adequate remedy at law in their state court action. If, as they now allege,

^{11/} Indeed, this is precisely the basis upon which the federal district court obtained personal jurisdiction over the same defendants in this action.



the Texas officials violated their statutory duties in failing to retain custody of the property, or, alternatively, if they had been able to establish their rights to possession of the property, ^{12/} there is a substantial possibility that the Texas officials -- as well as the Arkansas officials, should the Crowders have chosen to join them as defendants -- would have been liable for money damages in an action sounding in tort, should the property not have been

^{12/} Even if a state court could not have obtained in rem jurisdiction there is no reason to believe that Texas courts were incapable of determining the propriety of the search and seizure and the parties' respective rights to the property. Assuming that the Texas statutes governing the disposition of seized property contemplate that the court will have jurisdiction over the res, there is no indication that such is a jurisdictional prerequisite; indeed, a Texas court did exercise its jurisdiction over the Crowders' action without having in rem jurisdiction.

recovered. 13/

In sum, we conclude that, as a matter of law, no violation of the Crowders' constitutional right of access to the courts occurred. The Crowders had unimpeded and meaningful access to the state courts -- and, as this action shows, the federal courts -- to challenge the legality of the defendants' actions; that they failed to pursue aggressively all of their legal remedies in the face

13/ The Crowders contend that Wolfenbarger v. Williams, 174 F.2d 358 (10th Cir. 1985), cert. denied, 475 U.S. 1065 (1986), establishes that the presence of other remedies will not excuse a violation of statutorily-required procedures regarding seized property. In Wolfenbarger, however, the court was considering the effect of the availability of post-deprivation remedies upon a procedural due process claim, not a claim based upon the substantive right of access to the courts. See id. at 362-65. The Crowders make only the latter claim and specifically forswear any procedural due process claim; we are thus not presented with the issue of whether the availability of these remedies comports with the requirements of the due process clause.



of what is admittedly a novel legal situation cannot be the basis for visiting liability upon the defendants.

III.

The Crowders also obtained jury findings indicating that individual defendants Sinyard, Phillips, Godwin, Jones, and Charles Lambert violated their fourth amendment rights by engaging in an unlawful search and seizure. Because the jury also found that the acts of Sinyard, Godwin, and Jones represented the official policies of Miller County, Sevier County, and the city of DeQueen, respectively, the district court also found the three governmental units liable for violating the Crowders' fourth amendment rights. The defendants contend (1) that there was not sufficient evidence to establish a fourth amendment violation; (2) that they are immune from liability as a matter of law; and (3)



that the district court erred by instructing the jury that the defendants bore the burden of proof on the crucial issue of whether the items seized were in "plain view."

We conclude that, as to four of the five individual defendants a new trial is required on the question of whether an unlawful search and seizure occurred; as to those four defendants, however, we also conclude that the district court erred in denying their motion for a directed verdict or j.n.o.v. on the ground of qualified immunity. Finally, because our resolution of the qualified immunity issue does not extend to the governmental units, ^{14/} we reach the defendants' third contention and hold that the court erred in placing upon them the burden of proof on the "plain view"

^{14/} See Owen v. City of Independence, 465 U.S. 622 (1980).

issue. Consequently, as to the governmental units, we conclude that a new trial is required on the fourth amendment claim.

The Crowders' fourth amendment claim was presented to the jury on special interrogatories. The jury found, inter alia, the following facts:

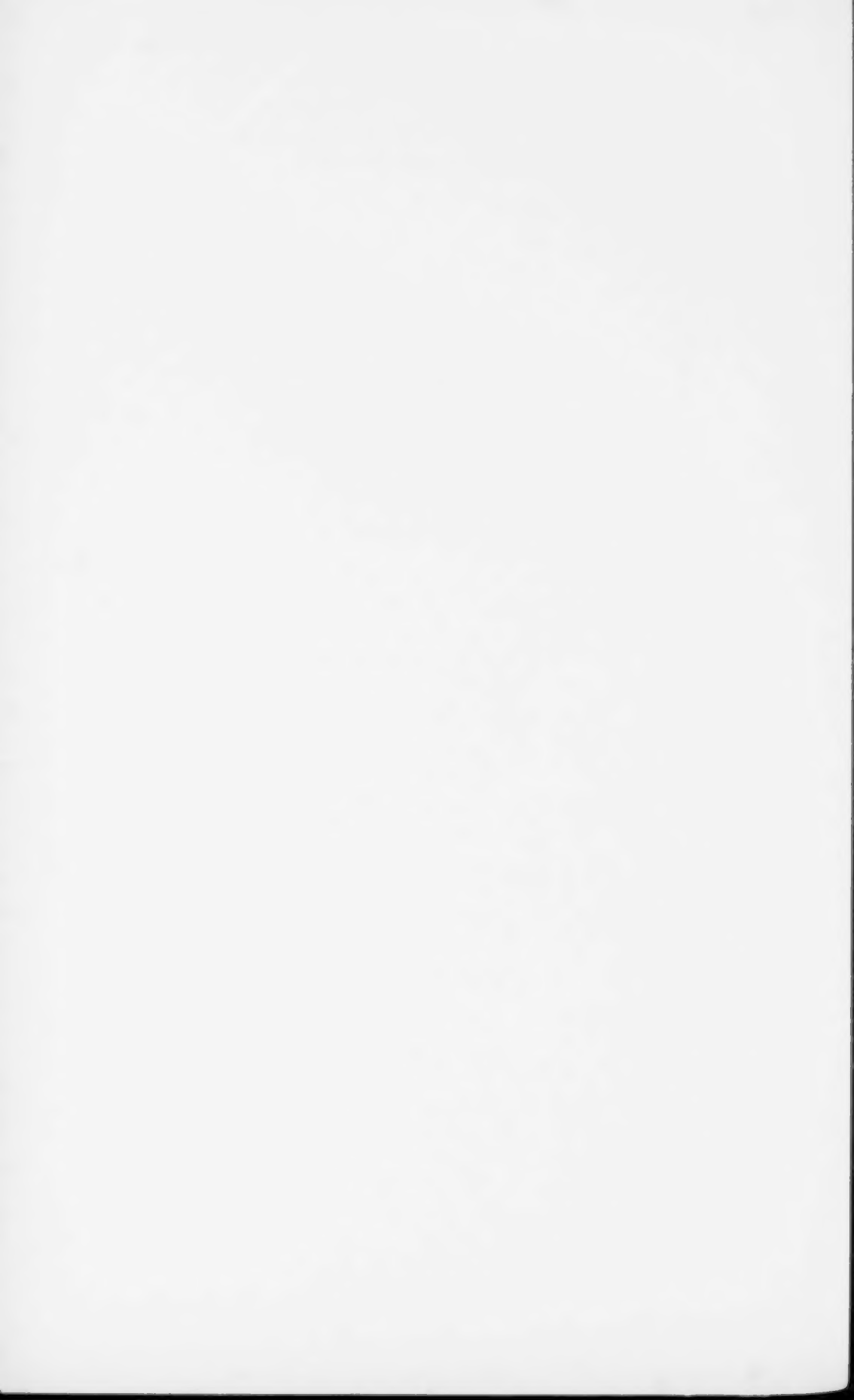
- (1) that a reasonable person would have believed that the information contained in the affidavit underlying the search warrant was reliable;
- (2) that a reasonable person would not have concluded, upon the basis of the reference in the affidavit to the statute defining the offense of unlawful appropriation of property (section 31.03 of the Texas Penal Code), that Crowder knew, or could be presumed to have known, that the property he bought from Broyles was stolen;
- (3) that a reasonable person would have believed that the description in the search warrant of the premises to be searched was insufficient;
- (4) that a reasonable person would have believed that one of the five objects to be seized was described in the warrant with insufficient particularity;



- (5) that the defendant officers had the reasonable and good-faith belief that the warrant was valid;
- (6) that the officers searched in only those places where it would be reasonable to find the items described in the search warrant;
- (7) that only six of the items seized were in "plain view" of the seizing officers; and
- (8) that Sinyard, Phillips, Godwin, Jones, and Charles Lambert intentionally searched the premises for property not described in the search warrant.

The district court interpreted these findings as indicating that the defendants had violated the Crowders' fourth amendment rights by engaging in a "general, exploratory" search for items that were not described in the search warrant and that did not fall within the "plain view" exception to the warrant requirement. 15/

15/ To avoid any confusion, we also note that the district court did not decide whether the jury's answers indicated that the warrant -- and therefore the search carried out for



We address here three of the defendants' arguments. First, both the individual and governmental defendants assert that the evidence is insufficient to support the jury's finding that the individual defendants "intentionally searched the business premises of J. Ralston Crowder for property not described in the search warrant." Second, the individual defendants argue that the court erred in not holding that they were entitled to qualified immunity as a matter of law. Finally, both groups of

specifically those items described in it -- was invalid. Were we to address this question we likely would have to undertake an inquiry which the district court avoided, namely, reconciling the jury's inconsistent findings (numbers (1) through (5) above) regarding the reasonableness of the officers' reliance upon the warrant. Because the finding of liability on this claim obviously was premised upon the jury's finding that Sinyard, Godwin, Phillips, Jones and Charles Lambert went beyond the scope of the warrant, we likewise do not express



defendants contend that the district court erred in instructing the jury on the issue of whether the items seized but not described in the warrant were in "plain view."

A.

In reviewing the challenged jury finding, we look to see whether "there is evidence of such quality and weight that reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusions." Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). Because the jury found in favor of the plaintiffs on this factual question, we assess the evidence "in the light and with all reasonable inferences most favorable" to the plaintiffs. Id. at 374.

any view as to the validity of the warrant.



After a careful review of the record, we conclude that the evidence adduced at trial is sufficient to support this factual finding as to four of the five individual defendants. We address the evidence concerning each defendant in turn.

1.

(a) Miller County Sheriff Sinyard.

At the time of the search, Sinyard did not know which items were described in the search warrant; although he denied "searching" for anything, he admitted in his deposition that he was present at the scene to identify stolen property. 16/ He twice looked into open file drawers in Crowder's office; he denied, however, that he handled or seized anything in the drawers. With FBI agent Donald Lambert, he requested that Crowder

16/ At trial Sinyard denied that he was present at the search for the purpose of identifying stolen property.



open a safe; he also conducted Donald Lambert on a tour of the premises, although he denied that they were looking "for" anything in particular. Finally, one of his first acts upon arriving at the scene of the search was to ask his deputy, Phillips, whether he had found any of the items on a list used by Phillips to identify stolen property not listed on the warrant.

(b) Miller County Deputy Sheriff Phillips. Phillips, upon whose affidavit the search warrant was based, had knowledge of the items described in the search warrant. At trial, he testified that he went with the Texas officers to Crowder's office to assist in the search for those items. In his deposition, however, Phillips testified that he went to the office to "help identify the property, compare it with my stolen report." By Phillips's own admission he



looked at a number of items that had been removed f r o m various drawers and deposited on a desk in the office 17/ and recognized a ring reported as stolen in a burglary that was not a basis for the warrant. At that point he requested that a list of stolen property from one or more burglaries he brought to the office so that he could compare the items on the desk with items on the list.

(c) Sevier County Sheriff Godwin.

Godwin testified that it was primarily

17/ The testimony at trial indicated that, after opening one of the file drawers, Crowder handed Adams a zip-lock bag containing numerous items which he indicated he had bought from Broyles and Bradshaw. Other testimony indicated that at least some of the items were shown to Broyles and Bradshaw so that the two burglars could identify whether they were stolen property. Regardless of whether Broyles and Bradshaw identified the property as stolen, Adams, because the burglars had told the officers that all of the items they had sold Crowder were stolen, took all of the items and deposited them on a desk. The record does not reveal, however, whether all of the items placed on the desk were eventually removed from the premises.



his idea to get a warrant to search Crowder's office because "we lost a lot of stuff and we were trying to get it back." At the time of the search, however, he had not seen the contents of the affidavit or the warrant, although he testified that he had been told which items were listed on the warrant. As Crowder opened the file drawers, Godwin looked into them and he participated in showing the contents of at least one of the drawers to the burglars to see whether they could identify any of the items as stolen. By his own admission, he was "hunting the big silver [trays, goblets and the like] that my people in Sevier County had lost" -- items that were not listed in the affidavit or warrant. He also admitted having a list of at least thirty items not described in the warrant for which he was looking. Testimony from other officers indicated



that Godwin participated in seizing items from the drawers.

(d) DeQueen Chief of Police Jones.

By his own admission, Jones never saw the search warrant and thus could not have been searching for the items listed in the warrant. In his own words, he was there primarily to identify property stolen in one of the related burglaries that was suspected to be on the premises but was not listed in the warrant. Although he denied "searching" anything in that he did not physically open any drawers or other items in the office, he did admit that he looked into drawers opened by Crowder or others.

(e) Arkansas State Police Investigator Charles Lambert. Charles Lambert

did not read or know the contents of the warrant. His primary task at the scene of the search was to guard one of the burglary suspects in a hallway outside

Crowder's office. At one point he looked into one of the file drawers out of curiosity and saw a number of gold and silver bars; he did not look into any other drawers or engage in any other activities related to the search.

2.

The jury specifically found that the officers searched only in those places where it would be reasonable to find the items described in the search warrant, and that the officers had the reasonable and good-faith belief that the warrant was valid. The question, then, is whether Sinyard, Phillips, Godwin, Jones, and Charles Lambert, who admittedly were not present to search for the six items listed in the warrant, violated the fourth amendment by being present and in the case of some of them, comparing items found by the other officers with lists of items thought to have been taken in



related burglaries.

We have held repeatedly that similar actions by "outside," or additional, officers does not violate the fourth amendment where there has been an initial, lawful intrusion. For example, in United States v. Green, 474 F.2d 1385 (5th Cir.), cert. denied, 414 U.S. 829 (1973), a local fire marshal was lawfully present at a burned premises to investigate the origin of a fire that had just been suppressed. Sifting through the rubble, he located metal plates that appeared to have been designed for counterfeiting. He called a United States Secret Service agent who, without seeking a warrant, came to the premises and seized the plates.

We held that no fourth amendment violation occurred. We first determined that "[t]he activity that led to the discovery of the plates was within the



scope of the justification for the fire marshal's intrusion" and that he was not required to stop his investigation to obtain a warrant once the plates were discovered. Id. at 1389. More significantly, we concluded that given the lawful intrusion, the arrival and participation of another official -- even one from a different agency -- was fully constitutional:

The purpose of a search warrant is to ensure judicial authorization in advance, of intrusions into constitutionally protected privacy. Where a lawful intrusion has already occurred and a seizure by a State officer has validly taken place as a result of that intrusion, the invasion of privacy is not increased by an additional officer, albeit a federal officer, who is expert in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence. Once the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving



on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized. Terry v. Ohio, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; Harris v. United States, 1968, 390 U.S. 324, 88 S.Ct. 992, 19 L.Ed.2d 1067. The apparent conflict between the Constitution and common sense which the plain view doctrine has reconciled is the same misconception which we here seek to dispel. See Mapp v. Ohio, 1941, 367 U.S. 643, 647, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

Id. at 1390.

Later, in United States v. Brand, 556 F.2d 1312 (5th Cir. 1977), the defendant sought to suppress illegal drugs confiscated by police who entered his house without a warrant. One police officer had accompanied an ambulance attendant who had been summoned to the house. He and another officer who

arrived as the defendant was being put into an ambulance saw hypodermic needles, marihuana butts, and pills in plain view and called a narcotics investigator to the scene. After arriving and observing the suspicious items at the scene, the investigator directed that a warrant be obtained.

The defendant asserted that the only officer who had entered lawfully was the one who accompanied the ambulance attendant, as the exigent circumstance had ended by the time the other officers had arrived. Writing for the court, Judge Wisdom rejected defendants'assertion because

it misconceives the nature of the fourth amendment interest at stake. The amendment protects the citizen against invasion of privacy. Once that interest is invaded legally by an official of the State, the citizen has lost his reasonable expectation of privacy to the extent of the invasion. As this Court has held repeatedly,

additional investigators or officials may therefore enter a citizen's property after one official has already intruded legally. 9/ E.g. United States v. Green, 5 Cir. 1973, 474 F.2d 1385, 1390, cert. denied, 414 U.S. 829, 94 S.Ct. 55, 38 L.Ed.2d 63; United States v. Herndon, S.D.Fla. 1975, 390 F.Supp. 1017, aff'd, 5 Cir. 1976, 536 F.2d 1027; see Steigler v. Anderson, 3 Cir. 1974, 496 F.2d 793, 797-98, cert. denied, 419 U.S. 1002, 95 S.Ct. 320, 42 L.Ed.2d 277. Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist. Id. Thus the validity of the affidavit is not vitiated by the late entry of the affiant and the other policemen.

9/ Of course, the later officials must confine their intrusion to the scope of the original invasion unless a warrant or one of the exceptions to the warrant requirement justifies a more thorough or wide ranging search.

Id. at 1317-18.

To the same effect, in United States v. Roberts, 619 F.2d 379 (5th Cir. 1980), local deputy sheriffs



entered an apartment pursuant to a warrant authorizing them to search for a television set. While there they observed possible gambling paraphernalia and called the Federal Bureau of Investigation. Federal agents arrived and joined the local officers in seizing the gambling-related items. In an opinion by Judge Rubin, the court upheld the denial of a motion to suppress. Citing, inter alia, United States v. Green, the court held that the decision to await arrival of the federal officers, to assist in identifying the contraband before seizing it, "does not affect the validity of the seizure." Id. at 381.

Finally, in Vance v. United States, 676 F.2d 183, 189 (5th Cir. 1982), we summarized the import of these cases in an opinion by Judge Politz:

The common thread in Green, Brand, and Roberts is two-pronged: the law enforce-

ment officer initially entering the protected area was justified in doing so, and, while there, he observed items of an obviously illegal character. In such an instance the officer could appropriately share the information with other law enforcement personnel bearing particular responsibility in that field. In those instances warrants were not necessary to authorize the conduct of the later arriving officers.

We noted, as well, that the "plain view doctrine is limited to "inadvertent" discoveries of evidence by police officers acting within the scope of an otherwise justified intrusion.' [Roberts] 619 F.2d at 381 (quoting Coolidge v. New Hampshire, 403 U.S. [443 469 (1971) (plurality opinion)])."

These cases inform us that we look to the element of intrusiveness to determine whether the presence of additional officers violates the fourth amendment: If their presence effects no intrusion other than that which is

implicated by a lawful entry, there is no violation. We look first then, at whether the entry by the officers who were in fact looking for the items listed in the warrant was lawful. We need not consider, in this case, whether the search warrant was valid, ^{18/} as the jury specifically found that all of the officers ^{19/} acted in the good-faith belief that the warrant was valid. Under United States v. Leon, 468 U.S. 897 (1984), this good-faith belief renders lawful the presence of the officers who entered under authority of the warrant and were searching for items listed therein.

^{18/} By intimating no view as to whether the warrant was valid, we do not wish to imply that it was not.

^{19/} I.e., Sinyard, Phillips, Jordan Godwin, Jones, Aycock, Adams, Raffaelli, Elliott, Neel, Charles Lambert, Don Lambert and Campbell.



(6) We next inquire whether the officers who were not looking for items in the warrant enlarged by their presence and their activities, the extent of the intrusiveness. In other words we must heed the warning of United States v. Brand that "the later officials must confine their intrusion to the scope of the original invasion" 556 F.2d at 1317 n. 9.

This matter was addressed by the jury, which specifically found that no officer searched in places where it would be unreasonable to find the items described in the warrant. Thus, the intrusion, for fourth-amendment purposes, was the same as it would have been if no officer had been present who was not looking only for items listed in the warrant. In other words, the search of Mr. Crowder's premises -- and any consequent invasion of privacy -- at no



point exceeded the search that was authorized by the warrant, as no officer went beyond the intrusion which the warrant countenanced.

It follows that under Green, Brand, Roberts and Vance the presence and participation of additional officers -- even those present to investigate other crimes or to provide expert guidance -- does not render unlawful an intrusion by other officers who are properly on the scene. The facts here are perhaps closest to those in Green, where the fire marshal, lawfully on the scene, uncovered items that arguably were instrumentalities of crime. He called "a federal officer, who is expert in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence." Green, 474 F.2d at 1390. In the case sub judice the evidence reflects

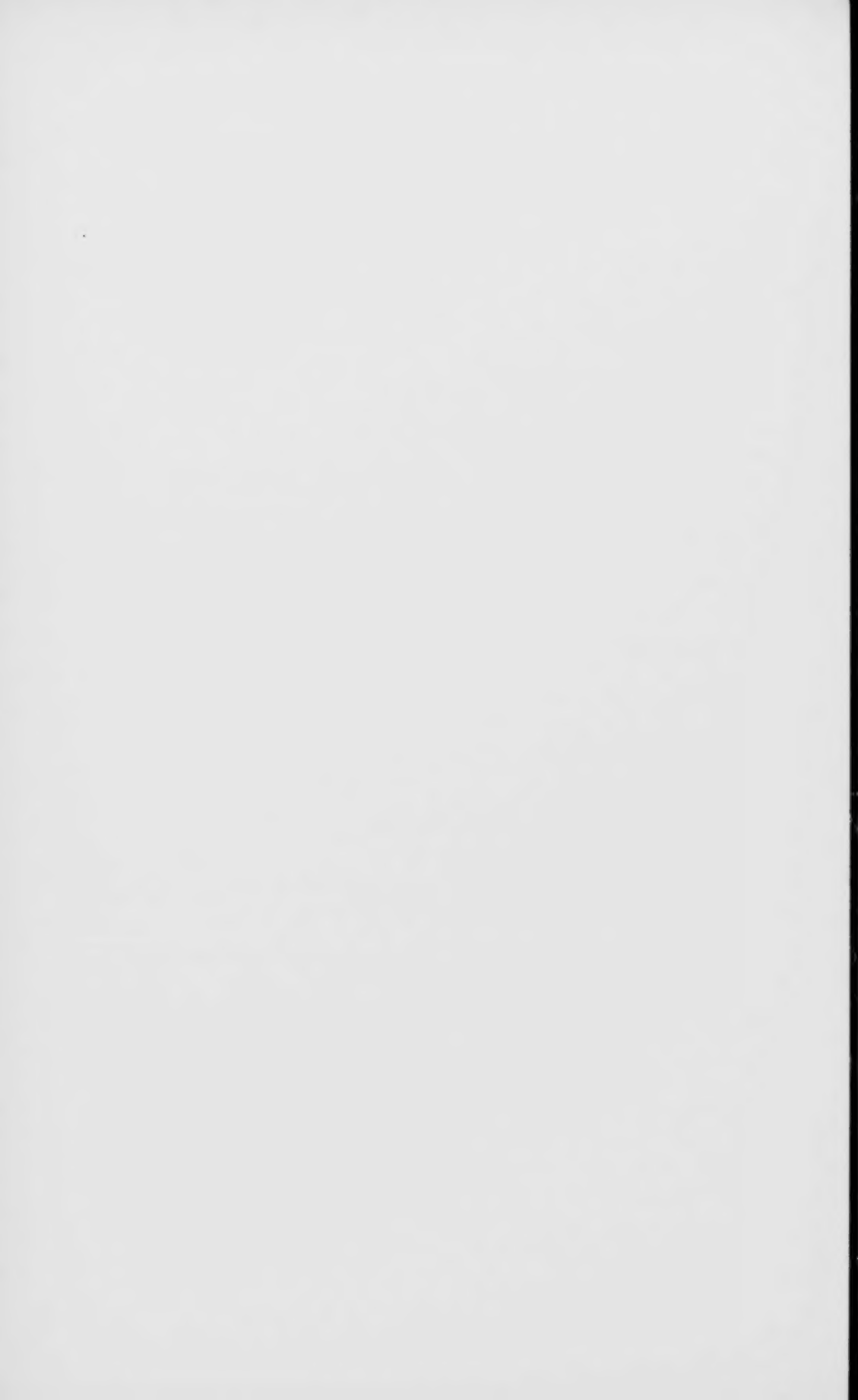


that, at least for the most part, the officers looking for the items in the warrant did the "searching" -- opening of drawers and the like -- and that when items were unexpectedly uncovered that were not listed in the warrant but that may have been contraband, other officers were on the scene to determine, by using their own lists or their own knowledge, whether the items appeared to have been stolen. The first officers "could appropriately share the information with other law enforcement personnel bearing particular responsibility in that field." Vance, 676 F.2d at 189.

It is of no moment that the officers here all arrived at about the same time.

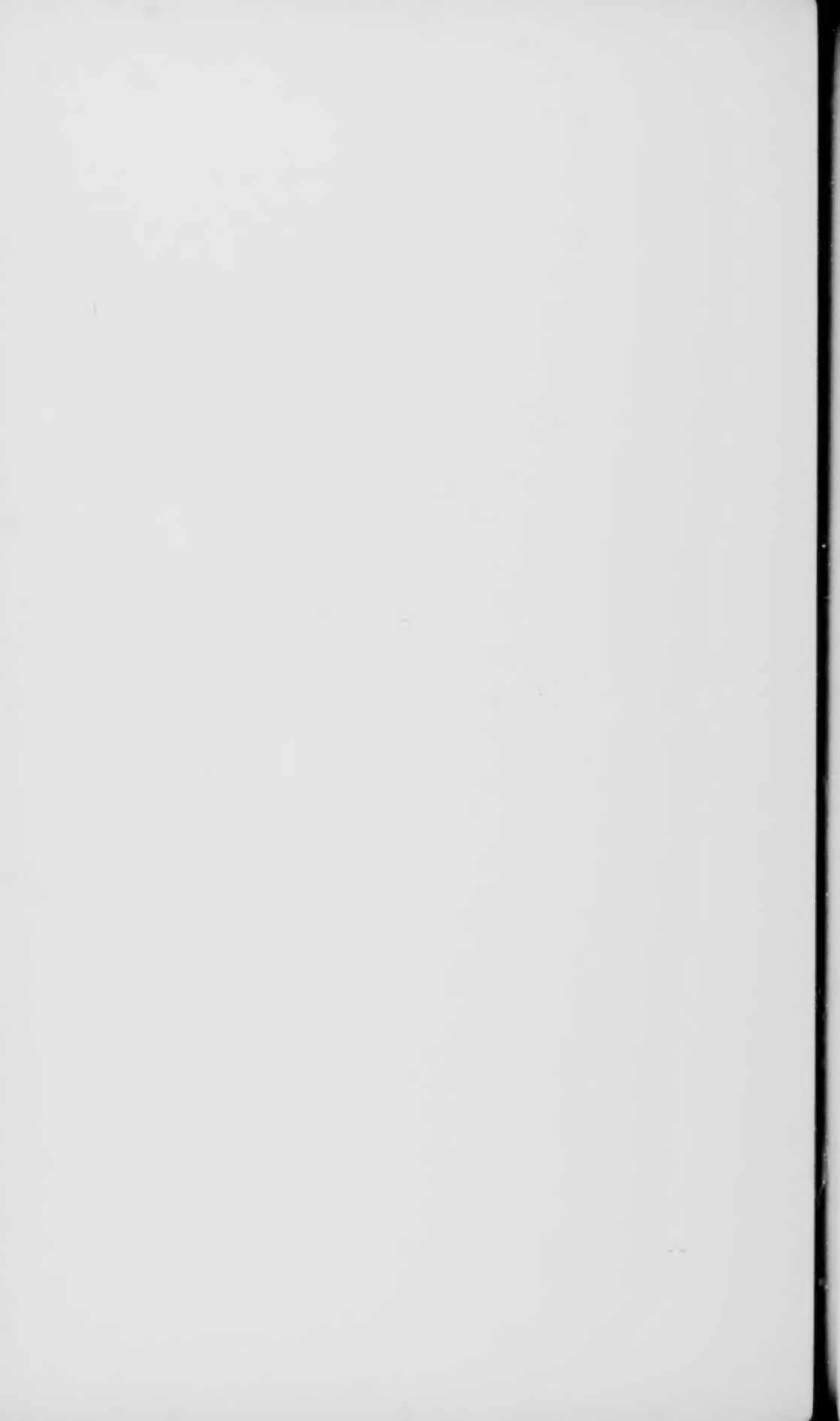
20/ For evaluating the extent of an

20/ Strictly speaking, the evidence shows that the officers charged with fourth amendment violations arrived a while after Adams and Aycock, who undeniably entered pursuant to the warrant. The time sequence thus is similar to that



intrusion under the fourth amendment, it would make no sense to require one set of officers to enter pursuant to a warrant, and then to require them to call for outside help whenever a suspicious item was located in a drawer. Arguably, the disruption to the premises would have been greater if the warrant-directed search had been interrupted for such a purpose; the extra time involved, and the annoyance caused by the movement of officers in and out, would have worked against, not in favor, of Mr. Crowder's privacy concerns.

(7) Moreover, it is well established that an officer engaged in a lawful search is not required to interrupt the same to procure a warrant to seize evidence which he has come across in the course of looking for items in the



warrant. Green, 474 F.2d at 1390 (citing Terry v. Ohio, 392 U.S. 1 (1968); Harris v. United States, 390 U.S. 234 (1968)). To the same effect, where an officer comes across items not listed in the warrant, it would serve no identifiable interest to require him to call for outside help to ascertain the nature of the discovered item, if that expertise can be close at hand in the form of other law enforcement officers.

We note as well that the case for defendants is made even stronger here by the fact that all of the officers were engaged in the investigation of a related series of burglaries. If the entry in, e.g., Roberts, of an officer from a different jurisdiction to view evidence of a totally unrelated crime (entry to find television set, federal officers called when gambling paraphernalia located) is justified without an

additional warrant, then surely the presence of additional officers who are investigating related burglaries has no constitutional ramifications.

3.

Thus, as we have established no fourth amendment violation was occasioned merely by the presence and participation of the officers who were not present primarily for the purpose of looking for items described in the warrant. We note, however, that the entry onto the premises and the opening of drawers and the like in search of the listed items is not the only "search" that arguably occurred for purposes of our fourth amendment inquiry in this case. There is ample evidence in the record that numerous items not listed in the warrant but seized from the premises were handled, physically examined, and moved about the premises in the process of the officers' determining

whether the respective items had been stolen.

In Arizona v. Hicks, 480 U.S. 321 (1987) the Court held that although officers are lawfully on a premises to search for certain items, a separate and additional "search" occurs when they come across other items and move or handle them in such a way as to reveal materially identifying characteristics. Id. at 324-25. ^{21/}

[T]aking action unrelated to the objectives of the authorized intrusion which exposed to view concealed portions of the apartment or its contents did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry [T]he distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches is much more than trivial for purposes of the Fourth Amendment.

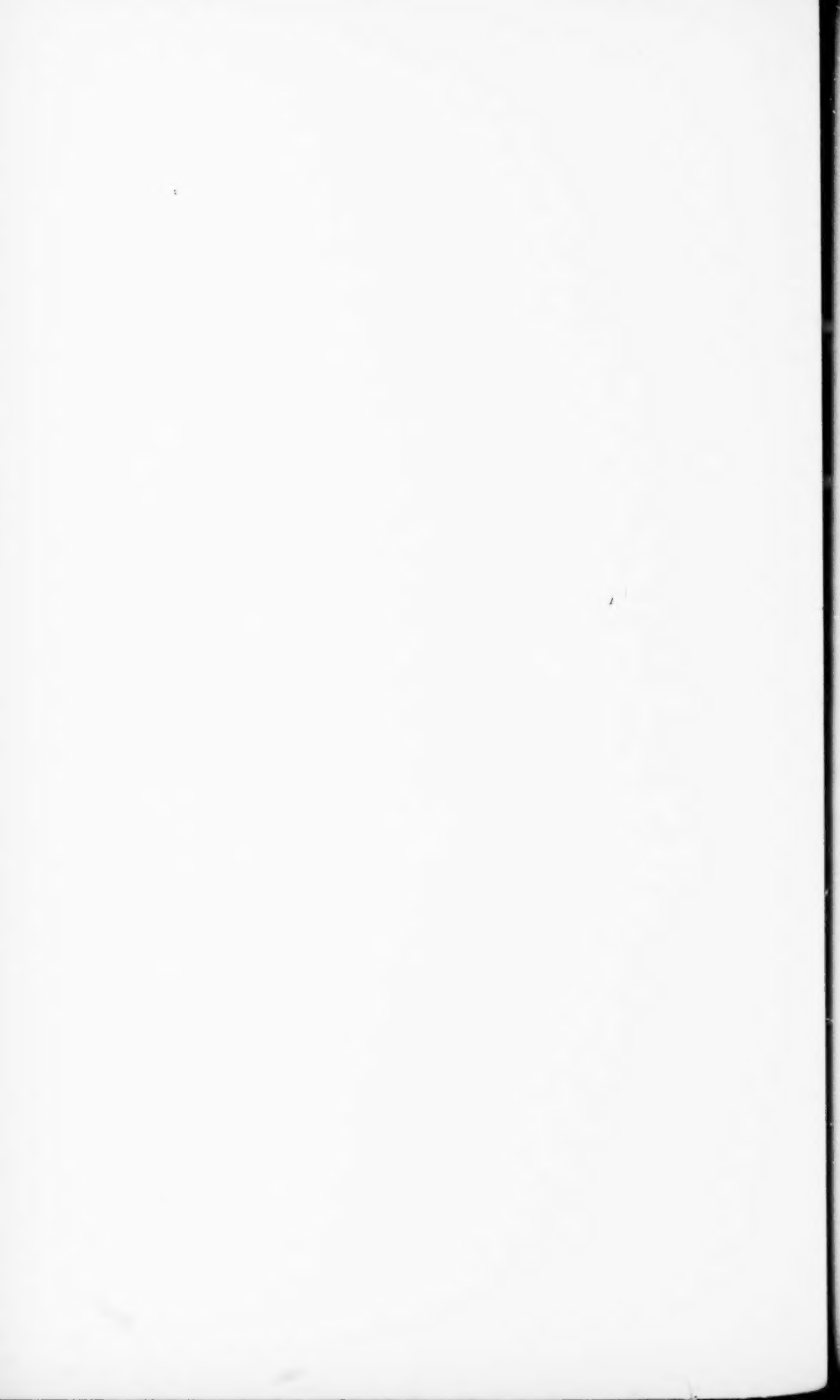
Id. at 325.

^{21/} See United States v. Lovell, 849 F.2d 910, 915 (5th Cir. 1988).



The Court acknowledged that such an additional search would not violate the fourth amendment unless it were unreasonable. The Court squarely held that the search would not be per se unreasonable merely because certain actions taken were not in furtherance of the justification for entry onto the premises. Id. In so doing, the Court was merely recognizing that "the 'plain view' doctrine can legitimate action beyond [the] scope . . . of the primary search itself." Id. at 325-26.

The Court concluded that the additional search at issue was valid if the plain view doctrine, as enunciated in Coolidge v. New Hampshire, 403 U.S. at 465, would have countenanced a seizure of the items at issue. Most importantly, the Court announced that the test for successfully invoking the plain view doctrine is whether the officer or



officers effecting the supplemental search had not only reasonable suspicion, but "probable cause to believe that the equipment was stolen." 480 U.S. at 326. The Court reasoned that the probable cause requirement thus applies to both the search and the seizure. Id. at 328.

In the case sub judice, there thus must be a determination of whether there was probable cause ^{22/} to examine ("search") and seize the items not shown on the warrant. The record before us does not permit that determination on

^{22/} In defining "probable cause" in this context, the Supreme Court has observed that it "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' Carroll v. United States, 267 U.S. 132, 162 . . . (1925) that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." Texas v. Brown, 460 U.S. 730, 742 (1983).

appeal. As many items were examined and seized, there arguably were fourth amendment violations as to all, some, or none.

The question as to each item is whether there was probable cause to "search" it (by handling or examination) when it was initially seen but before it was moved. Under Hicks, even close examination of an item discovered in plain view cannot constitute a search: "Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest." Id. at 325.

(8) If, for example, a drawer is opened (in pursuit of an item listed in the warrant) and items appear in plain view such that their visible character-



istics give the viewing officer probable cause to believe they are stolen, no additional search has occurred, and those items may be seized. In the event that an officer who is present only to look for items in the warrant happens to find items as to which he has no probable cause, he may call for or receive the collective assistance of the other officers who are lawfully on the scene under the rationale of e.g. Green, Brand, Roberts, and Vance. 23/

(9) There is a middle category which Hicks does not specifically address. Conceivably there were items, not listed in the warrant, that were moved, touched, or disturbed not in an

23/ See, e.g., United States v. Johnston, 784 F.2d 416, 420 (1st Cir. 1986) (evidentiary value of items can be determined by the shared knowledge and experience of the officers who are lawfully on the premises); United States v. Newton, 788 F.2d 1392, 1395 (8th Cir. 1986).



effort to examine them but in a reasonable effort to pick up, move, or seize either items listed in the warrant or objects as to which there was probable cause when those objects were first discovered. In a hypothetical case, for example, a silver tray listed in a warrant might be found in a drawer but under other items such as silver serving pieces, watches, and jewelry. If in removing the tray from the drawer an officer disturbs the other items so as to reveal further identifying information (e.g. initials on the back of a watch), the movement of the other items should not be considered an additional "search" under Hicks. This is because Hicks holds only that "taking action, unrelated to the objectives of the authorized intrusion . . . did produce a new invasion." 480 U.S. at 325 (emphasis added). Efforts to remove or examine items listed



in the warrant would constitute actions taken pursuant to the warrant and thus would not amount to an additional search for which probable cause would be required.

B.

The defendants assert that the district court erred as a matter of law in holding that they were not entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1980). We agree.

1.

As an initial matter, we must identify the standard of review to be applied. The jury returned a finding that none of the individual defendants proved that he "neither knew nor reasonably should have known that the action he took would have violated the clearly established rights of a plaintiff under the constitution or laws of the United States of America." In



its memorandum opinion denying the defendants' motion for a j.n.o.v. or new trial, the court agreed with the jury's finding but expressed some uncertainty as to whether the issue was to be decided by the jury or the court.

The defendants, citing Stein v. Board of the City of New York, 792 F.2d 13 (2d Cir.), cert. denied, 479 U.S. 984 (1986); Donta v. Hooper, 774 F.2d 716 (6th Cir. 1985), cert. denied, 483 U.S. 1019 (1987); and Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (en banc), contend that the question of whether they are entitled to qualified immunity is one of law to be decided by the court. Accordingly, they reason that we should engage in de novo review of the district court's conclusion that they are not entitled to qualified immunity.

(11) The record reveals, however, that far from objecting to the submission



of this issue to the jury it was the defendants who, over the plaintiffs' objection, requested that the interrogatory on qualified immunity be given to the jury. It is only now after they have obtained a jury verdict that they are not entitled to qualified immunity that defendants contend that the issue is one of law, not fact. Under these circumstances, where a party has not only acquiesced in the submission of an issue to the jury, but actually requested that it be so submitted, we refuse to entertain an argument that we should nonetheless review the verdict de novo. 24/

24/ See City of Springfield v. Kibbe, 480 U.S. 257, 259 (1987) (per curiam) (refusing to consider challenge to jury instruction accepted and requested by petitioner) Fed.R.Civ.P. 51 ("No party may assign as error the giving . . . of an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); cf. Melsar v. Spears, 862 F.2d 1177, 1184 n.



(12) After reviewing the evidence we nonetheless conclude that the district court erred in denying the individual defendants' motions for a directed verdict and j.n.o.v. on the ground of qualified immunity. Even if, as the plaintiffs assert, their actions may have run afoul of the fourth amendment, we conclude that no reasonable jury could have concluded that a reasonable officer would have known in 1981, that those actions violated clearly-established law. See Anderson v. Creighton, 483 U.S. at 641.

For the most part, the facts are not

7 (5th Cir. 1989) (where a section 1983 defendant fails to object to the submission of the qualified immunity issue to the jury, and the verdict is attacked for insufficiency of the evidence, the jury's determination of objective legal reasonableness under Anderson v. Creighton, 482 U.S. 635 (1987), is reviewable under the same standard as any other jury determination.

in dispute. We assume, as did the district court, that reasonable officers acting in good faith would have believed that they had a valid warrant to enter Crowder's office and perform a search for the items listed in the warrant. Moreover, all of the physical and temporal aspects of the search were within the confines of the warrant; The officers searched only where it would be reasonable to find the items listed in the warrant and, never having found all of the items listed in the warrant, had the right to search for as long as they did.

Finally the actions of the individual defendants are not in substantial dispute. For the most part they lacked knowledge of the contents and scope of the warrant and were, by their own admission, on the premises to look for and identify stolen property not listed in the warrant. This was accomplished

primarily by following the Texas officials and Crowder around the office as they executed the warrant by opening drawers file cabinets, and other containers, with Crowder at times pointing out property he had purchased from the burglary suspects; in nonlegal terms, the defendants simply identified stolen property, often from lists acquired for that purpose as it came into view.

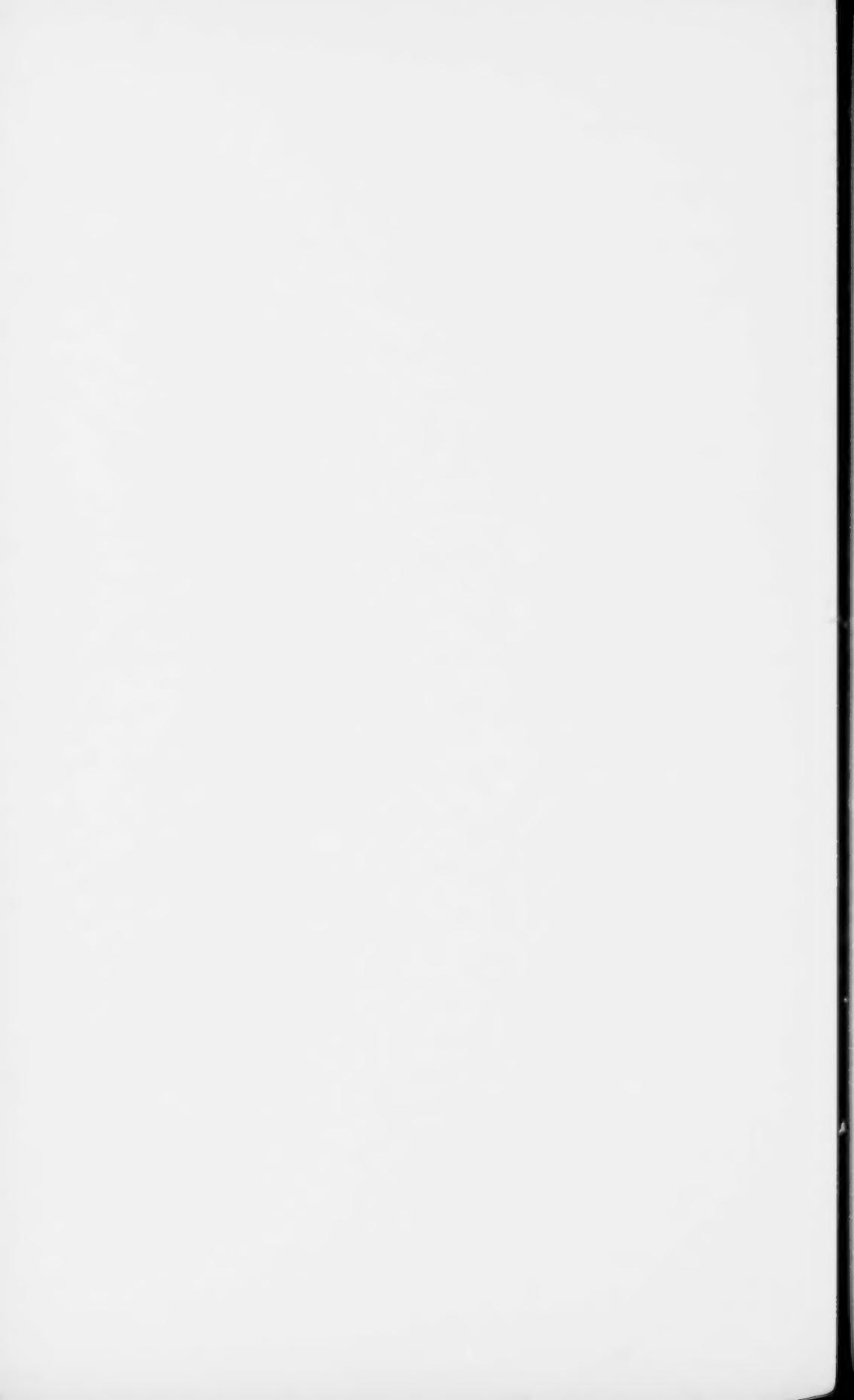
Regardless of whether we consider the alleged violation of the Crowders' fourth amendment rights to have been the fact that officers who were without knowledge of the warrant assisted in the search or the fact that items not listed in the warrant were seized, we conclude that a reasonable officer would not have known in 1981 that the defendants' actions violated clearly-established law. Although the district court and the Crowders sought to characterize the



defendants' actions as an unlawful "general exploratory search" undertaken without regard to the limits of the warrant, see Creamer v. Porter, we do not believe that the defendants' actions can be so neatly and simply characterized.

As noted above, the physical and temporal aspects of the search were conducted in compliance with the limitations imposed by the warrant. In Creamer, we held that police officers who continued to search after they had discovered and seized all of the items listed in the warrant and searched in places where it would be unreasonable to find such items, were not entitled to qualified immunity:

A general, exploratory search through personal belongings is the precise evil sought to be eliminated by the Fourth Amendment's requirement that things to be seized and places to be searched be described with particularity Under no circumstances could the



officers justify their intrusion into an area such as a desk drawer, a filing cabinet or a nightstand to search for a television set. There was no conceivable justification for the officers to continue the search after the items described in the warrant had been seized.

754 F.2d at 1318-19. To the contrary, the search in this case simply did not exceed the scope of the warrant. In other words precisely the same search would have been authorized and conducted had the defendants not accompanied the Texas officers to the premises. The facts thus do not support the characterization of the defendants' actions as constituting a proscribed "general" search undertaken without regard to the warrant.

The Crowders forcefully argue, however, that the defendants' participation in the search was not pursuant to the warrant for the simple reason that,



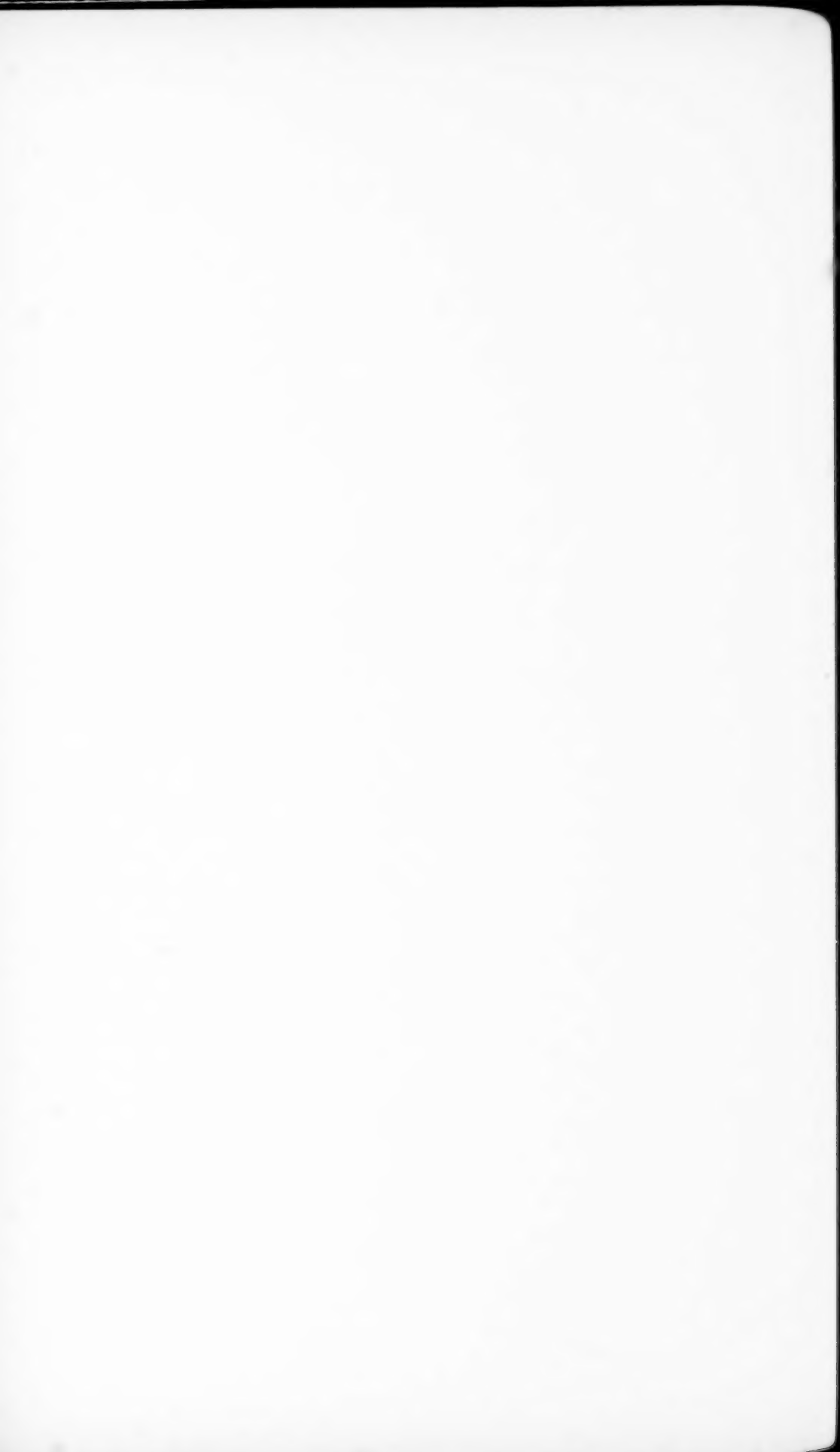
as the jury found, they were intentionally searching for and seizing items not listed in the warrant. It is undisputed, however, that the defendants were accompanying officers who were validly executing the warrant, and that their actions consisted primarily of identifying property as stolen once it came into view during the course of the search. We thus come to what we believe is the heart of the qualified immunity issued in this case: Was it clearly unlawful for the defendants to assist in the search for the purpose of identifying, for seizure under the "plain view" doctrine, property that was not listed in the warrant?

We conclude that the answer to this question can only be "no." It was not until 1987 that the Supreme Court held in Arizona v. Hicks that probable cause is required, under circumstances such as these before items not set forth in a



warrant may be moved and seized. In sum, as of 1981 a reasonable police officer would not have known that it was a violation of the Crowders's fourth amendment rights to participate purposefully in a search, notwithstanding lack of knowledge regarding the contents of a warrant, by looking in otherwise concealed areas for and identifying stolen property not described in the warrant during an otherwise lawful search encompassing the same areas for stolen items listed in the warrant. ^{25/} Because the individual defendants thus were

^{25/} Moreover what caselaw did exist at the time, all of it coming from the courts of states far removed from Texas and Arkansas, indicated that it was permissible for officers to be accompanied by victims, informants, or other persons familiar with the case for the purpose of identifying property turned up during a search but not listed in the warrant. See generally 2 W. LaFave Search & Seizure §4.11(c) at 343 (2d ed. 1987) (collecting cases).



entitled to qualified immunity, the district court erred in denying their motions for a directed verdict or j.n.o.v.

C.

1.

(13) The defendants also assert that the district court erred in instructing the jury that they bore the burden of proving by a preponderance of the evidence that the seized items fell within the "plain view" exception to the warrant requirement of the fourth amendment. ^{26/} Applying the long-standing

^{26/} The court instructed the jury that

[a] peace officer seeking to justify the seizure on the basis of that [sic] the item seized was in plain view must prove by a preponderance of the evidence the following: (1) that his intrusion onto the premises was lawful, because he entered the premises pursuant to a valid search warrant (2) that the item seized was



rule that the plaintiff bears the burden of proving each essential element of a claim, we agree that the court erred in placing upon the defendants the burden of proof on this issue. 27/

The elements of a section 1983 claim are well established. "[T]o recover under [section 1983] the Plaintiff must prove two vital elements: (1) that he

discovered or observed by him or other peace officers only inadvertently; and (3) that it was immediately apparent to the peace officer that the item seized was stolen property, evidence otherwise connected with criminal activity or contraband. (In this connection 'inadvertent' means accidental or unintentional.) If these requirements are not met the seizure of such an item is not lawful.

27/ Of course, in a criminal case the government has the burden of proving the facts that justify an exception to the warrant requirement. See United States v. Berick, 710 F.2d 1035, 1037 (5th Cir.) cert. denied 464 U.S. 918 (1983); 2 W. LaFave, supra, § 11.2(b) at 218.



has been deprived of a right 'secured by the Constitution and the laws' of the United States; and (2) that the persons depriving him of this right acted 'under color of any [state] statute'. . . ."

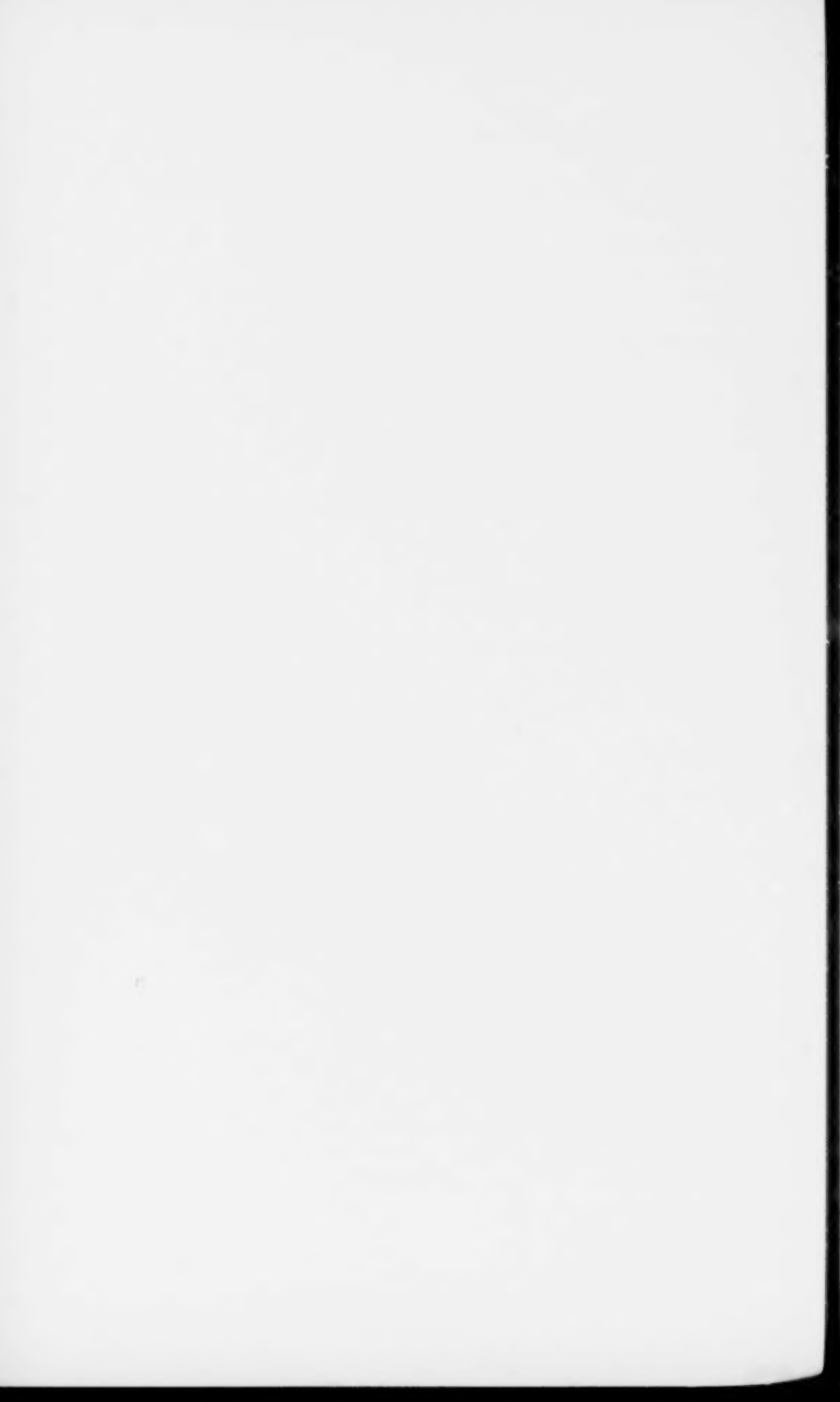
Daniel v. Ferguson, 839 F.2d 1124, 1128 (5th Cir. 1988) (citing cases). In the context of claims based upon a deprivation of fourth amendment rights, the burden of proof on these elements is equally well-established: The plaintiff must prove the existence of each element by a preponderance of the evidence. 28/

28/ See Hand v. Gary, 838 F.2d 1420, 1424 (5th Cir. 1988) ("We deal with both constitutional theories (malicious prosecution and false arrest) and find that under each theory . . . plaintiff failed to prove a constitutional violation."); Gilker v. Baker, 576 F.2d 245, 246 (9th Cir. 1978) ("To prevail [in a section 1983 action based upon illegal arrest] such a plaintiff must show that the arrest was without warrant or other justification."). Cf. Gomez v. Whitney, 757 F.2d 1005, 1006 (9th Cir. 1985) ("A prerequisite to recovery under [§ 1983] is that the plaintiff prove that the defendants deprived him of a right



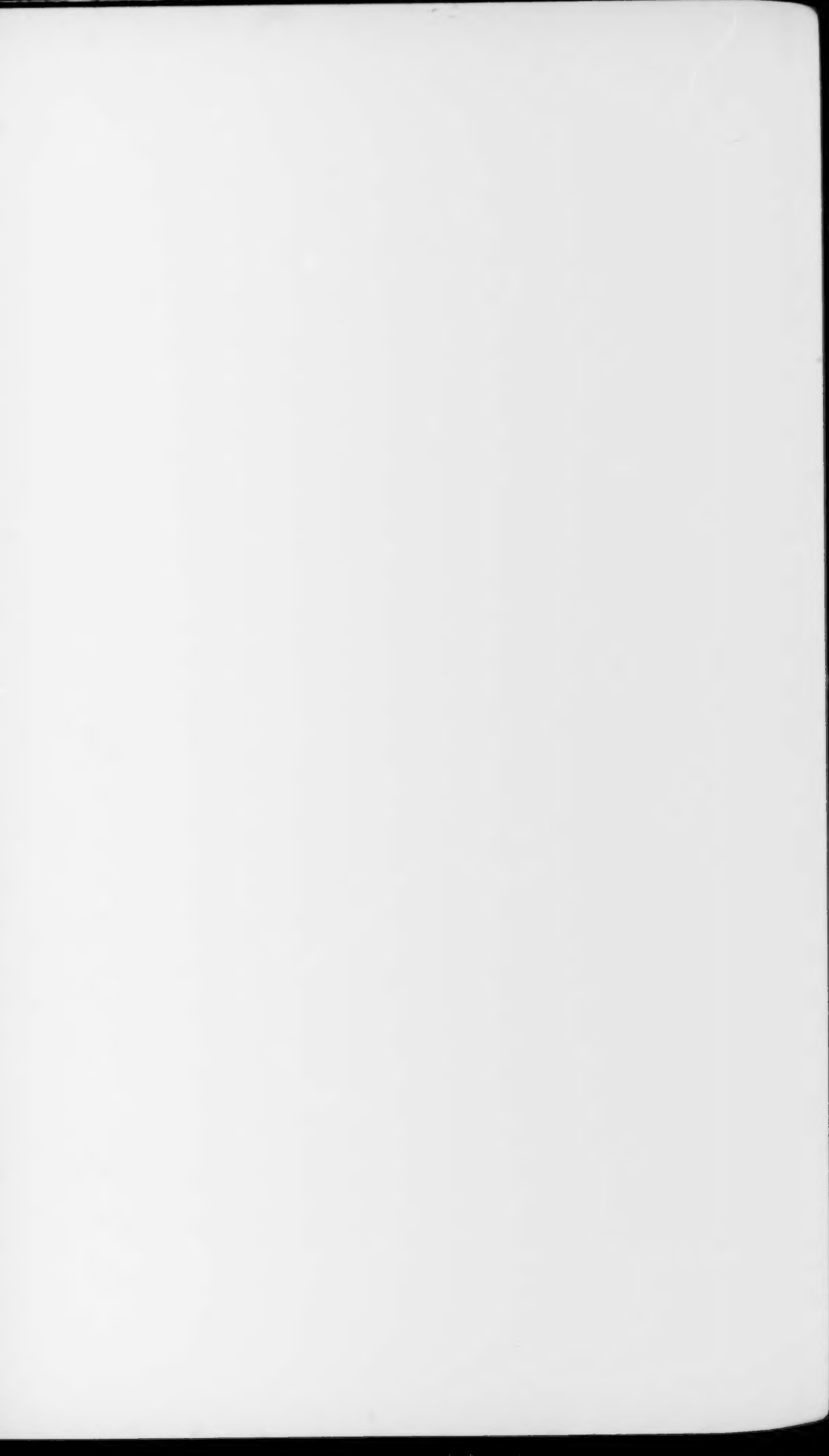
In their complaint, the Crowders alleged a deprivation of their fourth amendment rights, specifically, their right to be free from unreasonable searches and seizures. At least as a general matter, therefore, to prevail under section 1983, it was incumbent upon them to prove by a preponderance of the evidence that the search of Crowder's office and the seizure of their property was "unreasonable," as that term is understood in the context of the fourth amendment. The Crowders argue that they met their burden by demonstrating that the presumption of reasonableness arising from the issuance of a valid warrant attached to only four of the forty-six

secured by the Constitution and the laws of the United States.") Clark v. Mann 562 F.2d 1104, 1117 (8th Cir. 1977) ("Where, as here, suit is brought pursuant to 42 U.S.C. § 1983, plaintiffs ordinarily retain the burden of proof throughout the trial" (citing cases)).



items seized, the other forty-two items seized not being listed in the warrant. At that point, they contend, the burden of proof rested upon the defendants to show that the seizure of the items not described in the warrant was justified under one of the exceptions to the warrant requirement of the fourth amendment.

We do not agree. Such a holding would effectively negate the general rule that a plaintiff in a section 1983 action alleging a deprivation of fourth amendment rights bears the burden of proving that a violation of his or her rights has indeed occurred. The fourth amendment is not violated merely because the state officials lack a warrant to arrest someone or to perform a search and seizure; to the contrary, a considerable body of law is devoted to the proposition that, in a specified set of



situations, arrests, searches and seizures of property are "reasonable" under the fourth amendment, notwithstanding the fact that the officials have not obtained a warrant authorizing their actions.

Because of the diverse and frequent interaction between the police and the public, these exceptions to the warrant requirement come into play in a variety of circumstances. A warrantless arrest based upon a police officer's judgment that he or she has probable cause to believe that a crime is being committed in the officer's presence, for example, is a frequent basis for section 1983 claims. See, e.g., Gassner v. City of Garland, 864 F.2d 394 (5th Cir. 1989) (citing cases). Similarly, plaintiffs also commonly challenge warrantless searches and seizures that state officials contend are justified under one of



the recognized exceptions to the warrant requirement. See, e.g., Anderson v. Creighton, supra; Melear v. Spears, supra; Creamer v. Porter, supra. The point we make is this: Although section 1983 plaintiffs often challenge the validity of arrests, searches, and seizures carried out pursuant to a warrant, they also commonly challenge warrantless arrests, searches, and seizures.

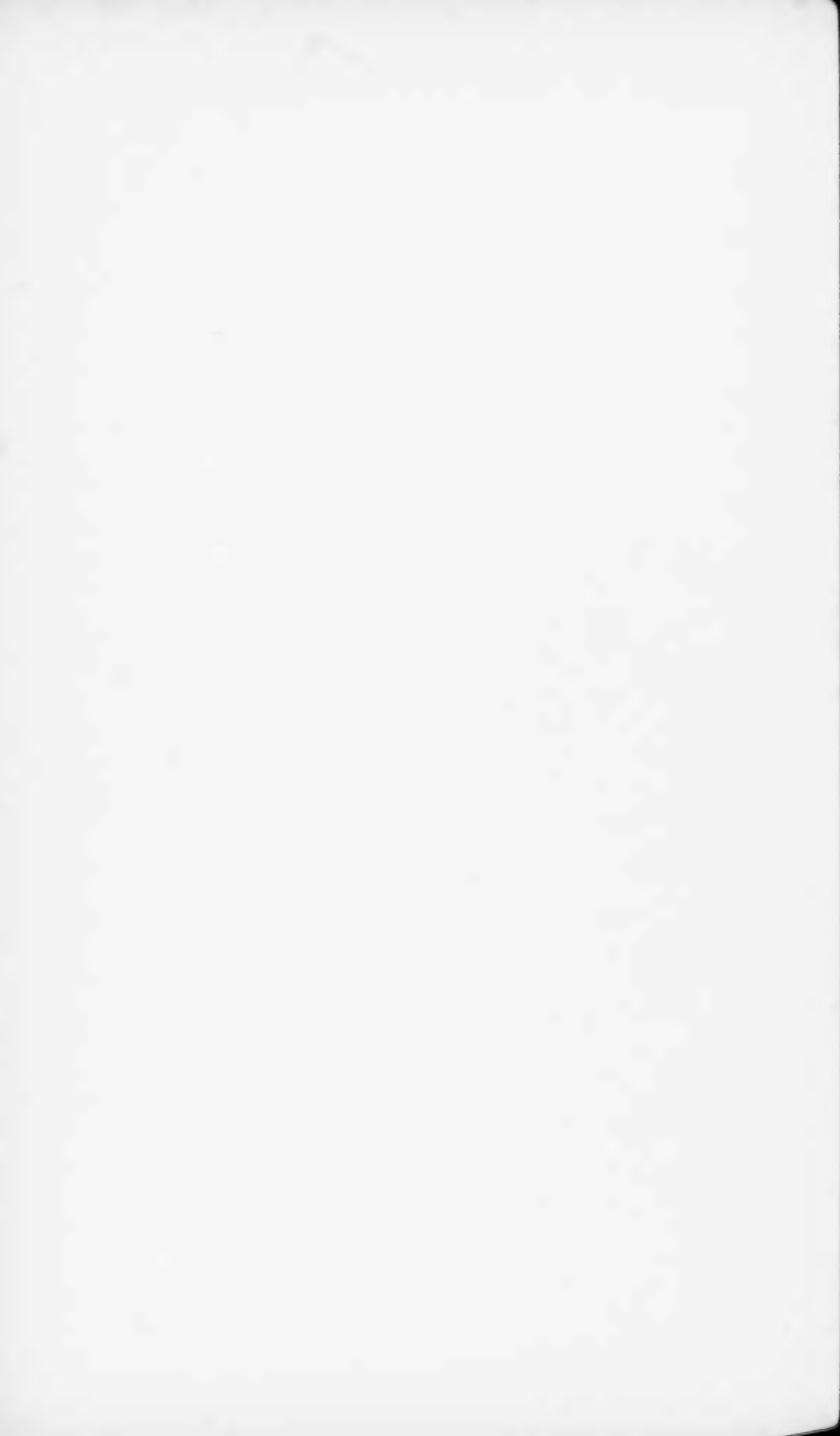
In light of this fact, we cannot agree that the burden of proof in a section 1983 case based upon an alleged fourth amendment violation should be shifted to state officials once the plaintiff establishes that the officials' actions were not authorized by a warrant. The plaintiff has alleged, and must prove that the state officials have committed a wrongful act; both law and common sense instruct us that the police,



in a great number of cases, do not commit such a wrongful act merely because they act without a warrant. In some such cases, a fourth amendment violation does occur -- but it is because the police act without a warrant and without authorization under one of the exceptions to the warrant requirement that such a violation occurs.

This result is arguably dictated by our own cases. In Hinshaw v. Doffer, 785 F.2d 1260 (5th Cir. 1986), a section 1983 plaintiff alleged that his fourth amendment rights were violated when he was arrested without a warrant and without probable cause. Our allocation of the burden of proof on the issue of whether there was probable cause to support his warrantless arrest is unmis-
takeable:

To prevail on a section 1983 claim for false arrest the plaintiff must prove that the



officer made the arrest without probable cause.

Id. at 1266 (citing Vela v. White, 703 F.2d 147 (5th Cir. 1983) and Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982)). 29/ Plaintiffs have not offered us, and we cannot perceive, any reasons to adopt a different rule in the case of a warrantless search. We thus hold that the burden of proof on the issue of whether the items seized were in plain view rests on the plaintiff in a section 1983 action based upon a warrantless search which defendants seek to justify under that exception to the warrant requirement.

2.

Moreover, in light of the foregoing

29/ But see Karr v. Smith, 774 F.2d 1029, 1031 (10th Cir. 1985) (stating, without citation to authority, that in a section 1983 case alleging an unlawful warrantless arrest, the burden of proof on the issue of probable cause is on the defendant).



discussion regarding the fourth amendment issues, we determine that some refinement is needed in the submission of those issues to the jury. As to the items not listed in the warrant, the defendants invoke the plain view exception enunciated in Texas v. Brown, 460 U.S. at 737. Recently, we interpreted the elements of the plain view exception to be as follows:

1. The officer must lawfully make an initial intrusion or otherwise properly be in a position from which he can view a particular area;
2. The officer must discover incriminating evidence "inadvertently," i.e., he may not know in advance the location of certain evidence and intend to seize it under the pretext of the plain view doctrine; and
3. It must be "immediately apparent" to the officers that the items they observe may be evidence of crime, contraband, or otherwise subject to seizure.

United States v. Espinoza, 826 F.2d 317



We have held here that as a matter of law, the entry of all of the officers onto the premises was lawful. Thus, the first element of the plain view exception has been met.

(14) The element of inadvertence must be determined on remand. On that element, the district court instructed the jury as follows:

Inadvertence is not shown, if a peace officer knew in advance the location of any such item and intended to seize it. On the other hand, such peace officer need not be totally surprised by the

30/ In Texas v. Brown, the plurality opinion, 460 U.S. at 737, accepts as a "point of reference" the plurality's view in Coolidge v. New Hampshire that inadvertence is required for invocation of the plain view doctrine. One concurring Justice noted specifically that the inadvertence requirement had never received the endorsement of a majority. Id. at 744 (White, J., concurring). In Espinoza, however, we read Texas v. Brown as imposing the requirement. Espinoza thus establishes the law of the circuit in this regard.



discovery of the item seized, for the discovery to be inadvertent; the discovery of such an item can be within the realm of foreseeable possibilities or even expected. In short, for the discovery of an item not listed in the warrant to be inadvertent, a peace officer must have lacked probable cause to believe the item would be discovered and must not have arrived with the intent of conducting a search for it.

This instruction was in error in requiring that the officer "must not have arrived with the intent of conducting a search for [an item not listed in the warrant]." The subjective intent of the officers is irrelevant; the test, as the jury was instructed, is whether the "officer knew in advance the location of [the] item," not whether he intended to look for it, on the possibility that it might be found, while he was lawfully on the scene. Thus, where, as here, the initial intrusion is made pursuant to a legitimate investigation and not solely

as a subterfuge to gain entry, the fact that other officers are looking for other items has no fourth amendment ramifications. 31/

(15) The third element of the plain view exception -- that it be "immediately apparent" that an item is subject to seizure -- stems directly from the rule, explained in Arizona v. Hicks, that the officer, or collectively, the officers, have probable cause as to the item. The district court, correctly noting the prerequisite of probable cause, charged the jury on the "immediately apparent"

31/ See e.g., United States v. Washington, 797 F.2d 1461, 1471 (9th Cir. 1986) (fact that the search conducted pursuant to the warrant was "a 'serious valid [] investigation'" is enough to defeat a claim of subterfuge) (quoting United States v. Hare, 589 F.2d 1291, 1296 (6th Cir. 1979)); United States v. Kimberlin, 805 F.2d 210, 229 (7th Cir. 1986) ("Although the offenses indicated in the first warrant were only misdemeanors, they were not trivial, and the FBI had a legitimate interest in pursuing them.").



element:

For the inadvertent seizure of an item not listed in the sworn application for the search warrant to be valid it must also be immediately apparent to a peace officer participating in the search that the item seized is stolen property, evidence otherwise connected with criminal activity, or contraband. It is not necessary that a peace officer know that a certain item is contraband or evidence relating to a crime; he need only have probable cause to believe that the item seized is stolen property, evidence otherwise connected with criminal activity, or contraband. A seizure of an item not listed in the sworn application for a search warrant is not justified, if its character as such stolen property, evidence or contraband become known only after close inspection. Only a brief inspection of an item in plain view is permissible, to determine whether there is probable cause to believe such item is stolen property, evidence otherwise connected with criminal activity, or contraband; and, in such circumstances, the peace officer must first have at least a reasonable suspicion that such is its character.



In light of Hicks the last two sentences of this instruction are inappropriate. Nothing in Hicks suggests that officers may not carefully, meticulously, and "closely" inspect those portions of an item that are in plain view. For example, the Court noted that the careful "recording of the serial numbers did not constitute a seizure." 480 U.S. at 324. Rather, under Hicks the fourth amendment concerns turn on whether the items are moved or disturbed so as to bring additional characteristics into view, not on whether the portions already visible are examined "closely."

Nor do we find any justification for the restriction that "[o]nly a brief inspection of an item in plain view is permissible." Again, Hicks appears to sanction lengthy inspection of whatever is in plain view. Finally, Hicks replaces a "reasonable suspicion"



requirement with its "probable cause" analysis. Id. at 326. Thus, "reasonable suspicion" disappears from the analysis in light of Hicks; there is no basis for concluding that an officer must first have reasonable suspicion before he can look at an item to determine the existence of probable cause.

IV.

(16) The governmental units held liable for the fourth amendment violations found to have been committed by their employees -- Miller County, Sevier County, and the City of DeQueen -- contend that the district court erred in refusing their motions for a directed verdict or j.n.o.v. We conclude that the court did not err. However, because the governmental defendants cannot be held liable unless their employees have violated the Crowders' fourth amendment rights, and we have vacated the judgment



of liability as to those employees, those three governmental defendants are entitled to a new trial on the issue of whether a fourth amendment violation occurred.

At trial, the Crowders sought to hold those defendants liable under the theory that the unconstitutional acts were committed by policymaking officials in the area of law enforcement and therefore constituted the official policies of the governmental units. After being instructed on this theory ^{32/} the jury found, in response to special interrogatories, that the actions of Miller County Sheriff Sinyard and Sevier County Sheriff Godwin "represented the official polic[ies]" of their respective employers. As to the actions of DeQueen

^{32/} The defendants also contend that the court's instructions constitute reversible error. We consider this argument infra.



Chief of Police Jones, the jury found that they "were pursuant to an official policy" of the city. We review these findings under the standard of review enunciated in Boeing Co. v. Shipman. See supra.

In St. Louis v. Praprotnik, 108 S.Ct. 915, 924 (1988) (plurality opinion), Justice O'Connor articulated several guiding principles to be used in determining "when a decision on a single occasion may be enough to establish an unconstitutional municipal policy." Drawing upon Justice Brennan's opinion in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), Justice O'Connor wrote:

First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." . . . Second, only those municipal officials who have "final policymaking



authority' may by their actions subject the government to \$ 1983 liability Third, whether a particular official has 'final policymaking authority' is a question of state law Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.

108 S.Ct. at 924 (quoting Pembaur, 475 U.S. at 480, 483 (plurality opinion)) (emphasis in original). A majority of the Court recently adopted the Praprotnik formulation in Jett v. Dallas Indep. School Dist., 109 S.Ct. 2702, 2723 (1989). 33/

A.

Miller County and Sevier County both argue that far from constituting "official policy," the actions of

33/ A thorough discussion of Pembaur and Praprotnik appears in our recent opinion in Worsham v. City of Pasadena, No. 88-2770, slip op. 5579, 5583-85 (5th Cir. Aug. 31 1989).



Sheriffs Sinyard and Godwin represent "the mere exercise of discretionary judgment by such Sheriffs in an area in which they were given no policymaking authority by state law." The essence of their argument is that, under Arkansas law, neither official was given responsibility for determining the county's policy regarding the actions of county police officials outside the jurisdiction of the county.

We find this argument to be meritless. Under Arkansas law, a county sheriff, in the execution of the statutory duty to perform law enforcement activities in and for the county, see Ark.Stat.Ann. §§ 14-14-1301(a)(5), 14-15-501, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body beyond a court of law, to which the sheriff answers. Although



Miller and Sevier Counties may be correct in suggesting that a sheriff's legal authority as a peace officer -- e.g. the authority to execute search warrants or to arrest suspects -- ends at the county line, this case illustrates that a sheriff's activities, and those of subordinates, are not similarly constrained by geography. Indeed, the Arkansas officials' testimony in this case indicates that they believed that their presence at the search was in furtherance of their official duties: to investigate the burglaries in their respective jurisdictions and to assist in the identification and recovery of property stolen in those burglaries.

Part and parcel of a sheriff's duties under Arkansas law, therefore, is to establish policies and procedures covering the conduct of departmental officers when they cooperate with, or



perform actions in conjunction with, officials from outside the county. To accept the counties' argument on this point would be to hold that when a member of the sheriff's office -- or, as in this case, the sheriff -- crosses the county line, he or she is beyond the authority and control of the county, even if the officer's actions are in furtherance of official duties and sanctioned by the highest county official with policymaking responsibility for law enforcement. This we cannot do.

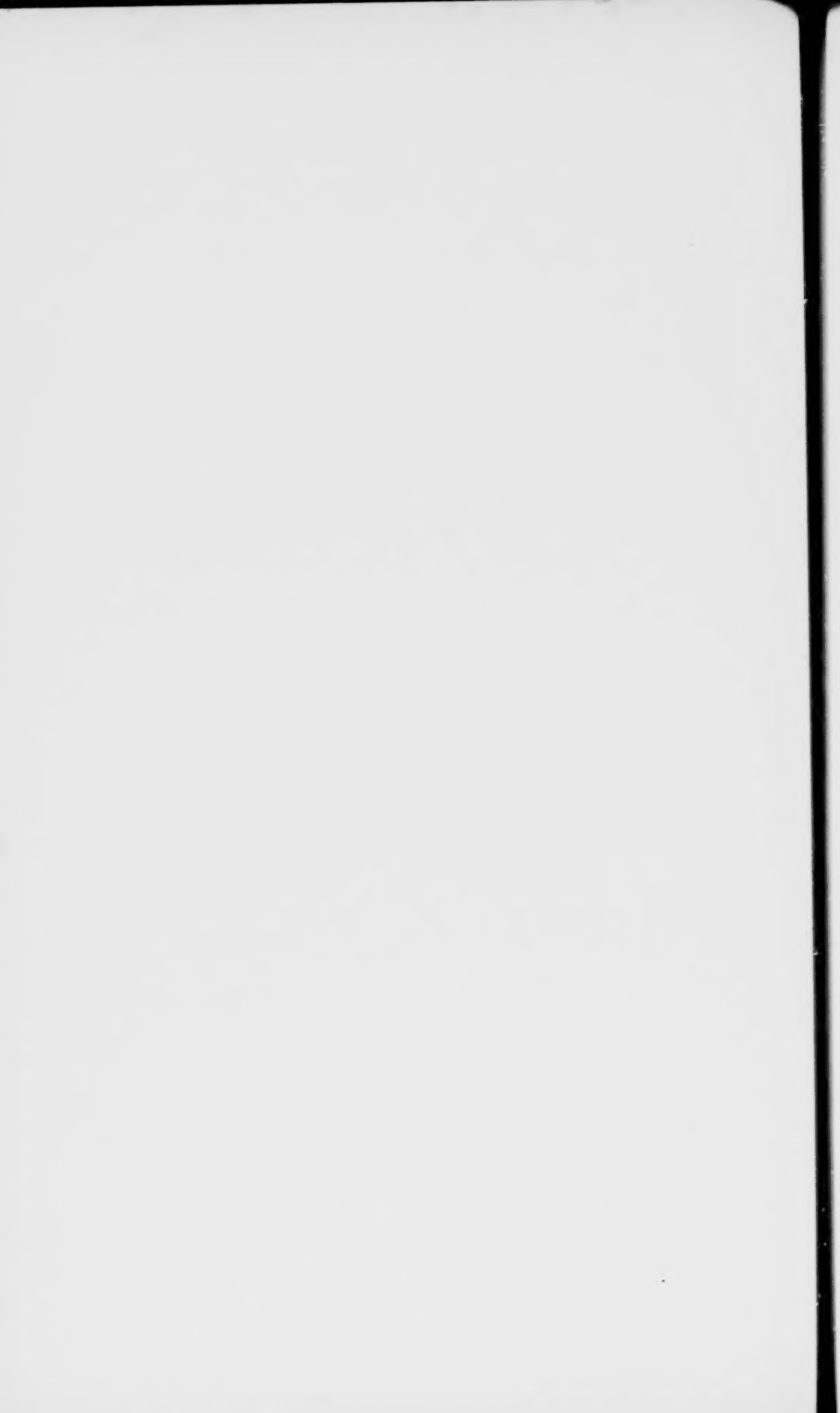
(17) In sum, we conclude that the jury had an ample basis upon which to conclude that Sheriffs Sinyard and Godwin were the "final policymaking authorit[ies]" with regard to the actions of their respective counties' law enforcement officials' activities outside their jurisdictions and that they were authorized and responsible

under Arkansas law for establishing policies and procedures regarding such activities. The district court properly denied the two counties' motions for directed verdict or j.n.o.v.

B.

(18) The city of DeQueen contends that it cannot be held liable because Chief of Police Jones was not the "final policymaking authority" with regard to the city's law enforcement activities. We conclude that the jury was free to make a contrary finding.

Unlike county sheriffs, city police chiefs in Arkansas derive their authority from the city's elected officials or, as in the case of DeQueen, the city manager. See Ark.Stat.Ann. §14-52-203(a) ("The duty of the chief of police and other officers of the police department shall be under the direction of the mayor.")' § 14-47-120 (The city manager



possesses "all powers except those involving the exercise of sovereign authority . . . vested in the Mayor."). The formal subservience of the Chief of Police to city officials is underscored by the ability of those officials to abolish the office outright. See Ellis v. Allen, 202 Ark. 1007, S.W.2d 815 (1941).

Notwithstanding that fact, Jones's own testimony, uncontradicted by any other testimony in the record, indicates that the city manager delegated all power regarding the city's law enforcement activities to Jones. He testified that he makes "all policies and procedures and ha[s] full supervisory capacity over all [DeQueen police] officers" and that except as to the department's budget city officials exercise no control over the department's activities, policies, or procedures. In Worsham, slip op. at



5584, we noted, applying Pembaur and Praprotnik, that municipal liability may be incurred where there has been a "complete delegation of power" to an official charged with a constitutional violation. Under these circumstances, the jury had an ample basis upon which to conclude that by delegating all control over the police department to Jones the city had vested him with "final policy-making authority" in this area, and therefore that Jones's actions were pursuant to, and constituted, official municipal policy in accordance with the reasoning of Pembaur, Praprotnik, and Jett. 34/

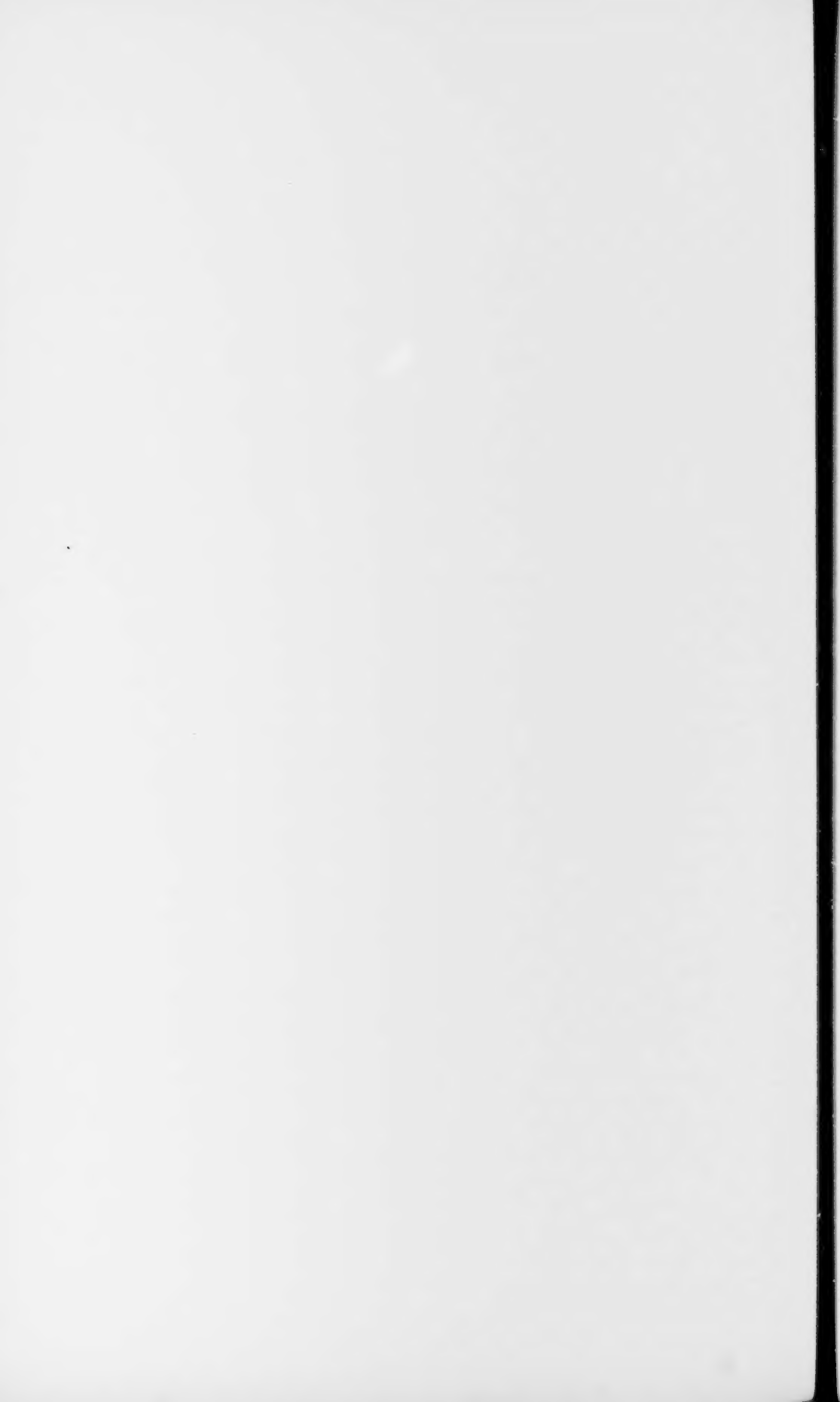
34/ See Praprotnik, 108 S.Ct. at 928; Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.) (en banc) (stating that an "official policy" may be made by the municipality's "lawmaking officers" or "by an official to whom the lawmakers have delegated policy-making authority") modified, 739 F.2d 993 (5th Cir. 1984) (en banc); Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir.

V.

The defendants have urged several other issues on appeal; it is likely that the district court will have to confront at least two of those issues again on remand. ^{35/} Lest the court's rulings on these matters be the subject

1987) (same). The governmental defendants did not argue in the district court and do not assert on appeal, that they were entitled to a directed verdict under the fourth Praprotnik principle, that "the challenged action must have been taken pursuant to a policy adopted by that official." Praprotnik, 108 S.Ct. at 924 (plurality opinion) (emphasis added); we thus do not express any view on this issue which can be considered by the district court if the governmental defendants elect to raise it.

^{35/} The defendants also challenge several of the district court's rulings regarding the admissibility of evidence showing what the officers knew regarding the burglaries and stolen property that did not form the basis for the warrant. Although the district court initially refused to permit the defendants to introduce such evidence, it later reconsidered its ruling midway through trial and admitted the same. Given the district court's reconsideration of its rulings, we think it unnecessary to address this issue.



of yet another appeal, we address them now.

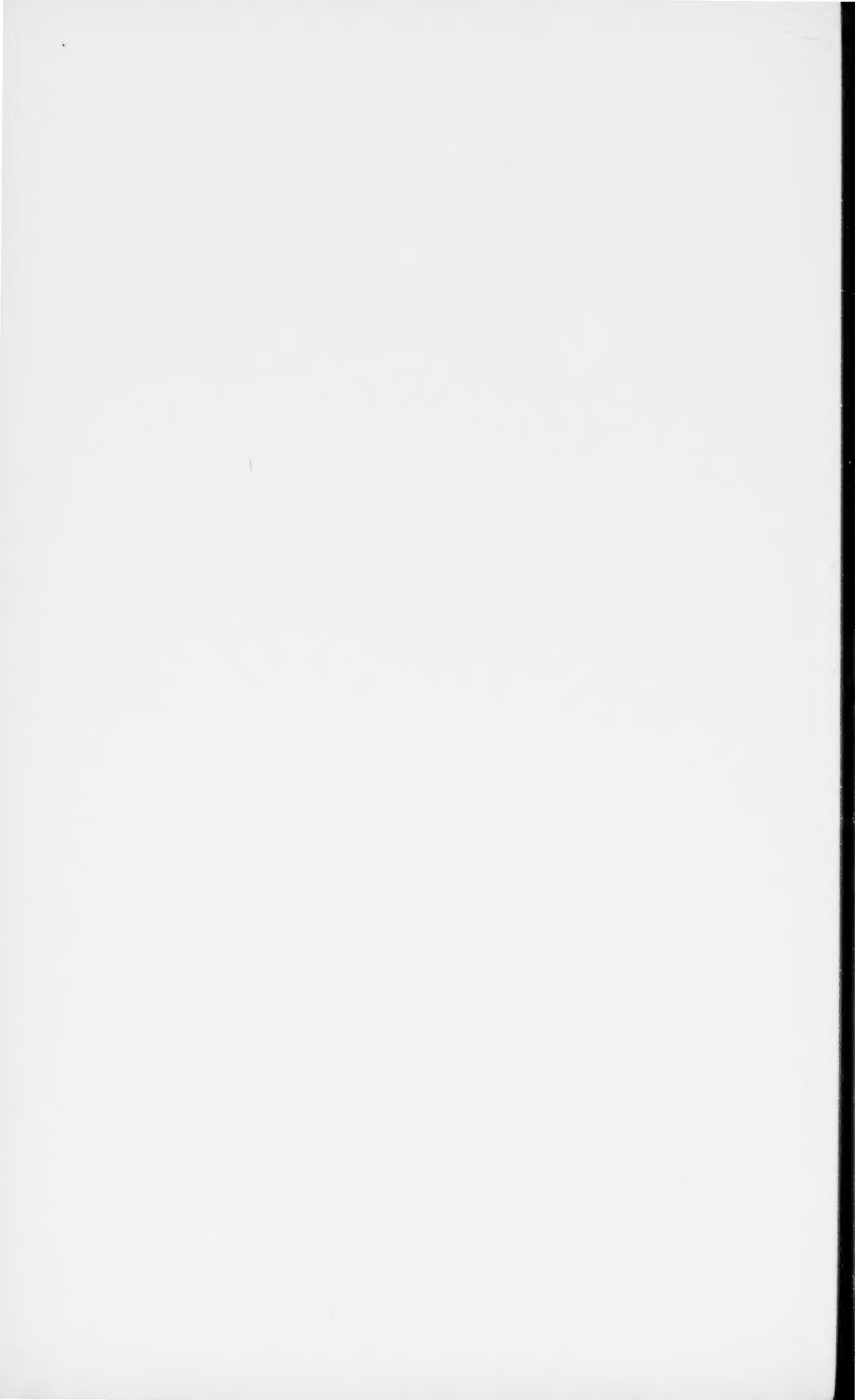
A.

1.

(19) The governmental defendants first contend that the court erred in instructing the jury on the issue of governmental liability. The court instructed the jury, inter alia, that

[c]ertain elected officials, such as a sheriff or a district attorney, are not answerable to the governing body of the county which they represent. By virtue of their powers under state law, they are responsible only to the voters who elect them for the particular tasks or areas of responsibility which are assigned to them by law. Such elected officials are the final authority of county power in those tasks or areas of responsibility and are policy-making officials whose actions represent official policy of that county.

The defendants objected to this instruction and requested that if it were given over their objection, the follow-



ing language be added:

They are however, only to be considered policymaking officials of their counties with respect to the particular areas of responsibility which are specifically assigned to them by state law.

The district court overruled the objection and rejected the proffered language.

36/

This matter should not have been presented to the jury in the first place. "Under the Praprotnik plurality view, the existence of final policymaking authority is a question of state or municipal law, not of fact . . . , [and] we are compelled to follow [that] plurality opinion." Worsham, slip op. at 5585 n. 8. Hence, on remand the district

36/ Because a different set of instructions covered the City of DeQueen's liability for the actions of Chief of Police Jones, our review of this question relates only to Miller and Sevier Counties.

court and not the jury, should decide whether the respective officers have "final policymaking authority" under state law concerning the actions at issue. See Jett, 109 S.Ct. at 2723. Only after "those officials who have the power to make official policy on a particular issue have been identified" should the jury be asked to determine "whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur." id., "or by acquiescence in a longstanding practice or custom which constitutes . . . standard operating procedure Id. (emphasis in original) (citing Pembaur, 475 U.S. at 485-87 (White, Jr. concurring)).

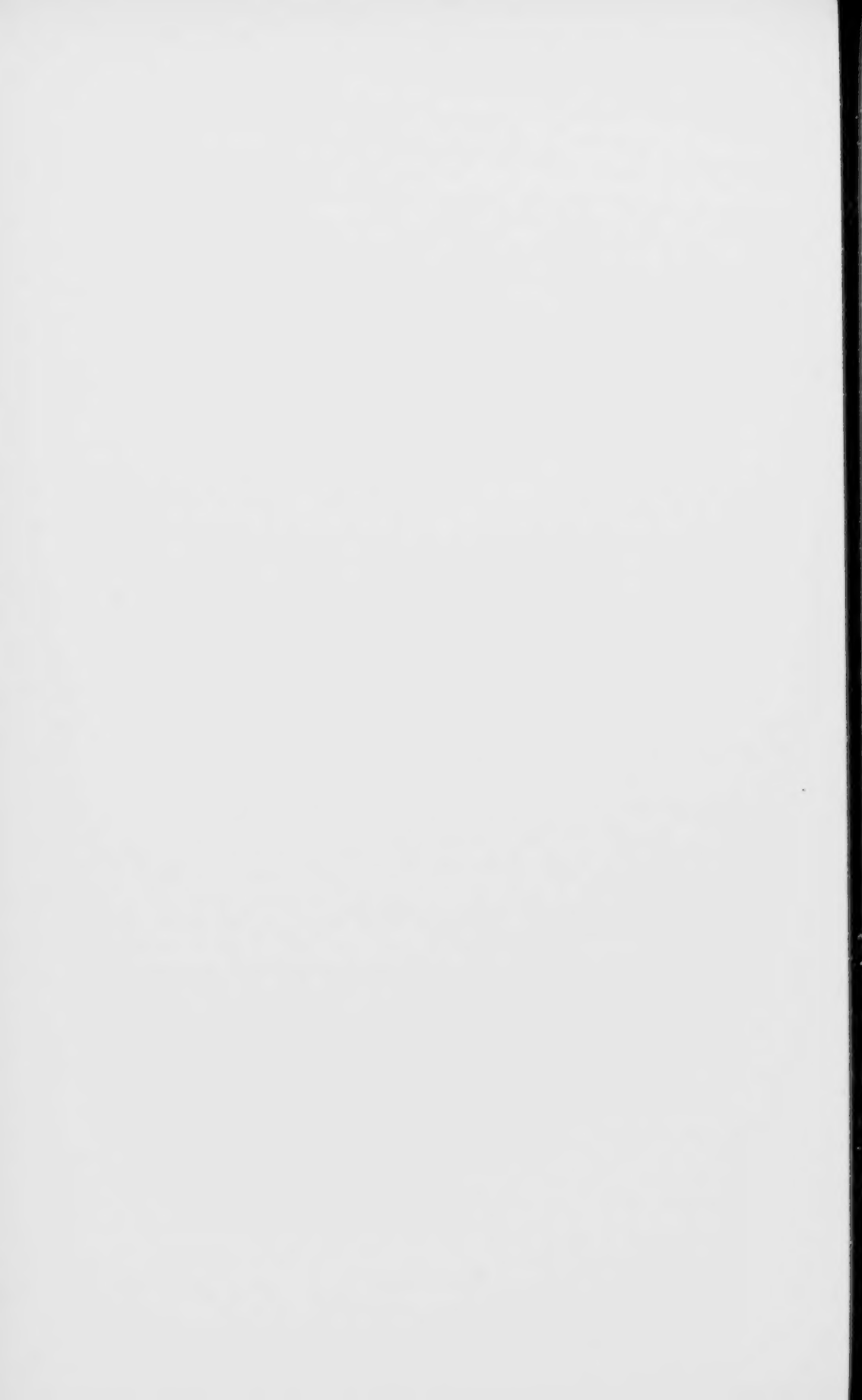
2.

(20) Regarding the cross-appeal we affirm the j.n.o.v. entered in favor of the City of Texarkana. In their appell-



ate brief, the Crowders identify two policies of the city that they assert caused city employees to act unconstitutionally: "(1) a policy of cooperating with out of state law enforcement officers in police investigations . . . and (2) a policy of relying on the district attorney's office for guidance and assistance" The Crowders acknowledge that these alleged policies were not themselves unconstitutional but that the asserted unlawful acts were perpetrated pursuant to those policies.

The Crowders contend that a municipality may be held liable even for constitutional policies pursuant to which its employees commit unconstitutional acts. In a recent pronouncement on municipal liability, the Supreme Court has agreed with this general proposition: "[W]e reject [the] contention that only unconstitutional policies are actionable



under [section 1983]." City of Canton v. Harris, 109 S.Ct. 1197, 1204 (1989). There the Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. (footnote omitted).

The instant plaintiffs do not assert inadequate training and the Court has not yet indicated whether inadequate training is the only area in which a city can be liable for a policy that is not itself unconstitutional. But the Court has reiterated that "a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.'" Id. at 1205 (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694 (1978), and Polk County v. Dodson, 454



U.S. 312, 326 (1981)) (brackets in original).

There is nothing in the record before us that indicates that any policies of the City of Texarkana reflected deliberate indifference to any constitutional concerns or were anything other than generic policies favoring effective law enforcement. Such general policies cannot be read as the "moving force" behind any asserted unconstitutional acts. To find municipal liability "on a lesser standard of fault would result in de facto respondeat superior liability on municipalities -- a result we rejected in Monell, [436 U.S. at 693-94]" City of Canton v. Harris, id. at 1206. Thus, the City of Texarkana may not be held liable on the

facts before us. 37/

B.

(21) The defendants also contend that the district court erred in refusing to submit an interrogatory to the jury asking whether it found "from a preponderance of the evidence that Plaintiff J. R. Crowder was guilty of negligence or any other breach of duty which was a proximate cause of any of the injuries" sustained by him or his wife. The defendants contend that in numerous instances, Crowder's own actions -- such as buying allegedly stolen property in the first place, identifying property in the office as having been bought from the alleged burglars, and failing to

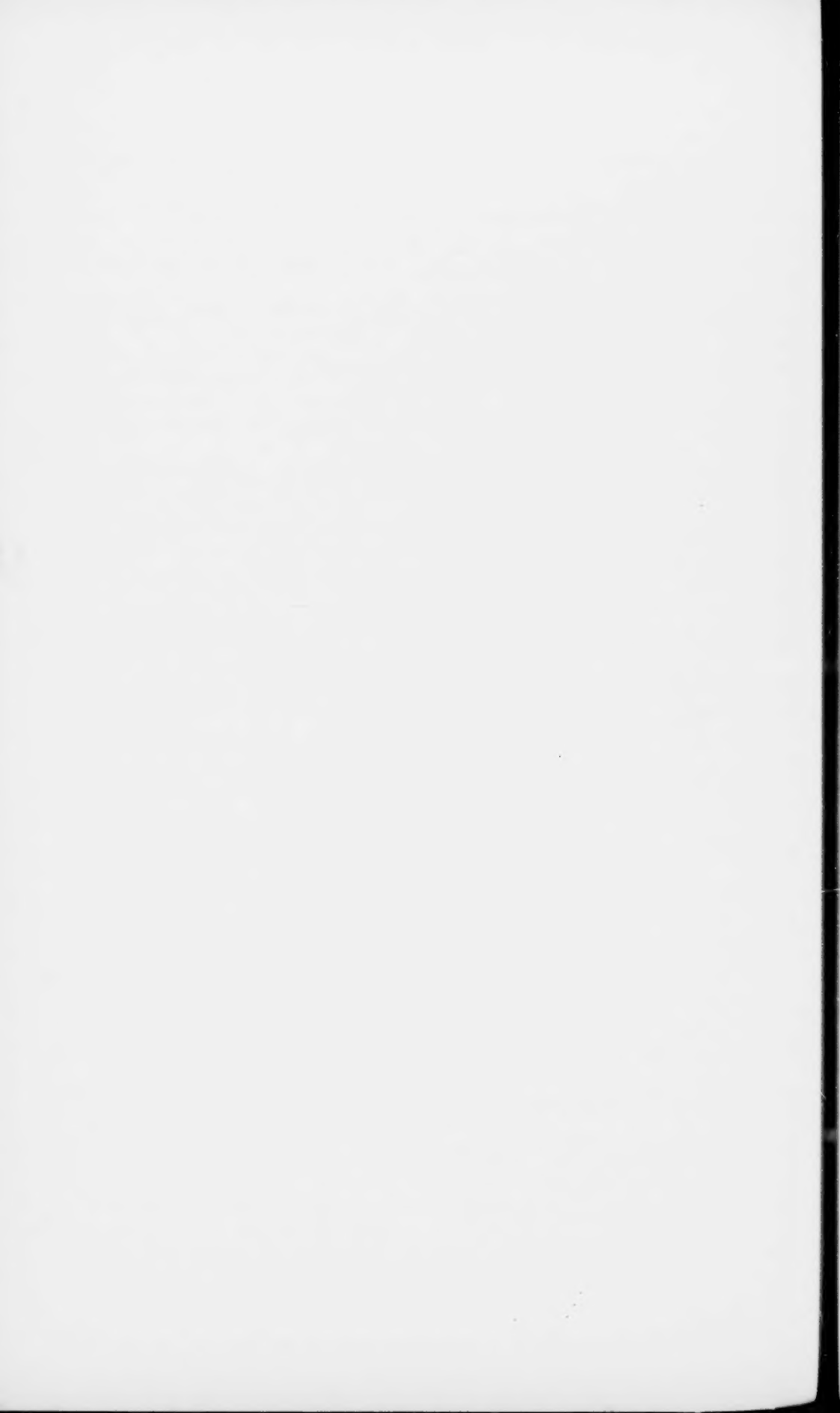
37/ We note, as well, that the City of Texarkana was found liable only for violating the Crowders' right of access to the courts. To this extent, our conclusion, infra, that there was no right-of-access violation is an alternative ground for upholding the j.n.o.v. in favor of the city.



keep records of his own property so he could determine what he had lost -- caused his injuries and that the jury should have been allowed to find him wholly or partially at fault.

For a number of reasons, we find no error in the rejection of this interrogatory. First, the interrogatory, unaccompanied by any instructions offered by the defendants is so vague as to be virtually devoid of meaning. The defendants themselves present at least five completely different theories as to why Crowder may have been contributorily negligent, none of which is conveyed to the jury by the interrogatory. The district court properly refused to set the jury helplessly adrift in such uncharted waters.

Second, many of the defendants' so-called "theories" of contributory negligence are little more than argument-



ative responses to the elements of the Crowders' claims, most of which the defendants were free to argue and the jury was free to consider on the elements of causation and damages. We consider the defendants' arguments that Crowder's lack of property records caused the "loss" of his property and that his physical injuries were the result of his own publicization of the case, for example, to fall into this category.

In sum, the defendants seem to have offered this interrogatory as a sort of "catch-all" question designed to allow the jury to return a verdict in their favor on the basis of any defense argument or theory that caught its fancy. But the purpose of jury instructions is to instruct, inform, and guide the jury in its deliberations; the interrogatory requested by the defendants serves none of those purposes. The district court



did not err in rejecting it.

VI.

In light of the fact that we have vacated the judgment of the district court, rendered judgment in favor of the defendants on one claim and remanded for a new trial on the other claim, there is no basis upon which to award the Crowders attorneys' fees under 42 U.S.C. § 1988. At this stage of the proceedings they simply have not prevailed on any significant issue in the litigation. See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 109 S.Ct. 1486, 1493 (1989). Thus, in vacating the judgment we also vacate the award of attorneys' fees. Hence, the appeal in No. 87-2455 is dismissed as moot.

VII.

In summary, the results of our decision today may be simply stated as follows: In No. 88-2049, as to all of



the individual defendants and as to governmental defendant Bowie County, which was held liable only on the right-of-access claim, the judgment is VACATED, and the case is REMANDED for the entry of judgment in their favor. As to governmental defendants Miller County, Sevier County, and the City of DeQueen, the judgment is VACATED, and the case is remanded for a new trial only on the issue of whether the governmental units' officials violated the Crowders's fourth amendment rights, pursuant to policy, and the issue of damages, if any. In the cross-appeal concerning the City of Texarkana, Texas, the judgment is AFFIRMED. In No. 87-2455 the appeal is DISMISSED as moot.



App. B: ORDER ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC,
entered November 13, 1989. _

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2049

NANCY CROWDER, Etc.,

Plaintiff-Appellee
Cross-Appellant,

versus

KEN SINYARD, Etc., ET AL.,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District
Court

for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion September 21, 5 Cir., 1989,
_____ F.2d _____)

(November 13, 1989)

Before GARWOOD, JONES, and SMITH, Circuit
Judges.



PER CURIAM:

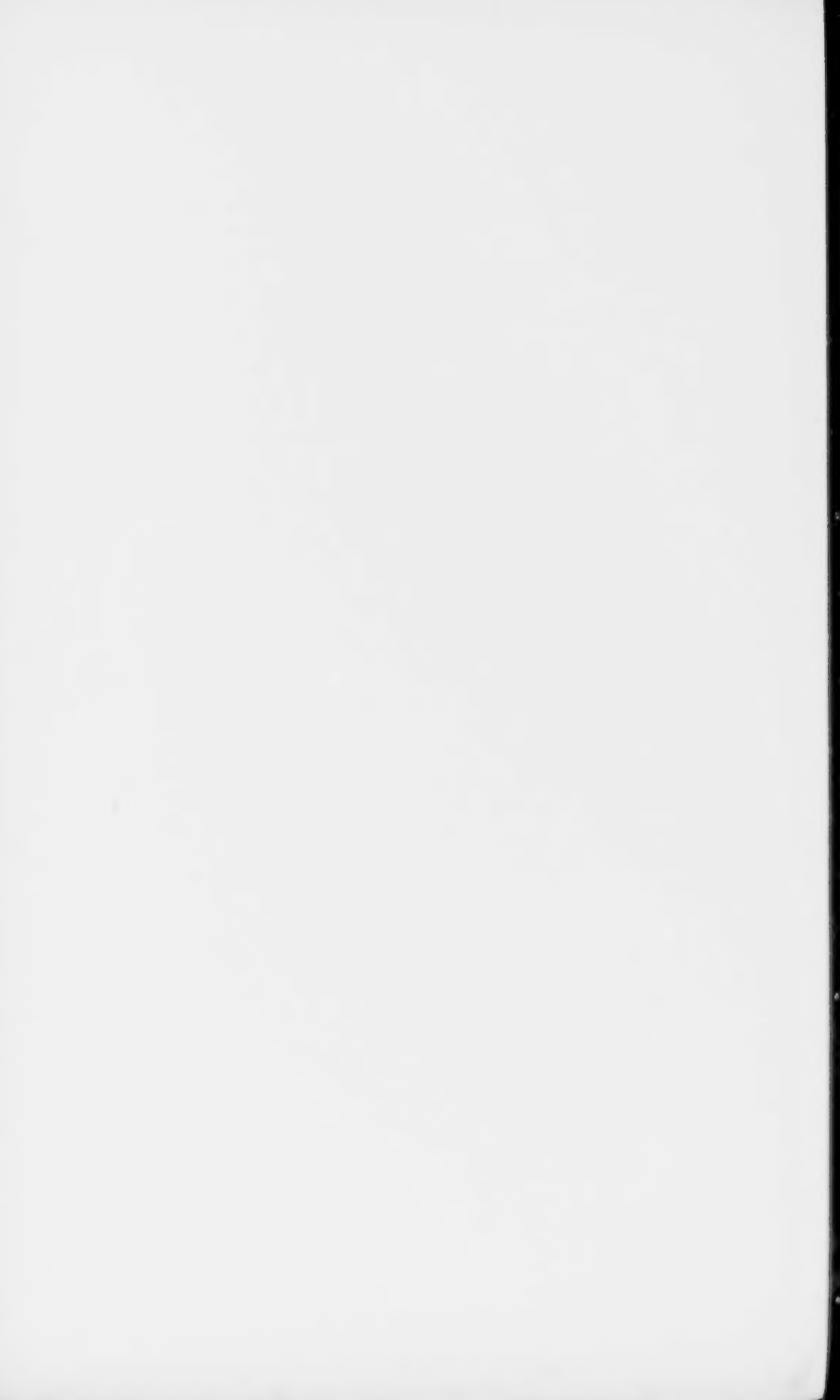
(XX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rule of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service havng requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT: CLERK'S NOTE:
SHEERAP FOR SOCIAL
OF THE MANDATE

/S/Jerry Smith
United States Circuit Judge



App. C: MEMORANDUM OPINION entered December 14, 1987 by trial court, granting judgment n.o.v. for two defendants and denying all other motions for judgment n.o.v.

IN THE UNITED STATES DISTRICT COURT

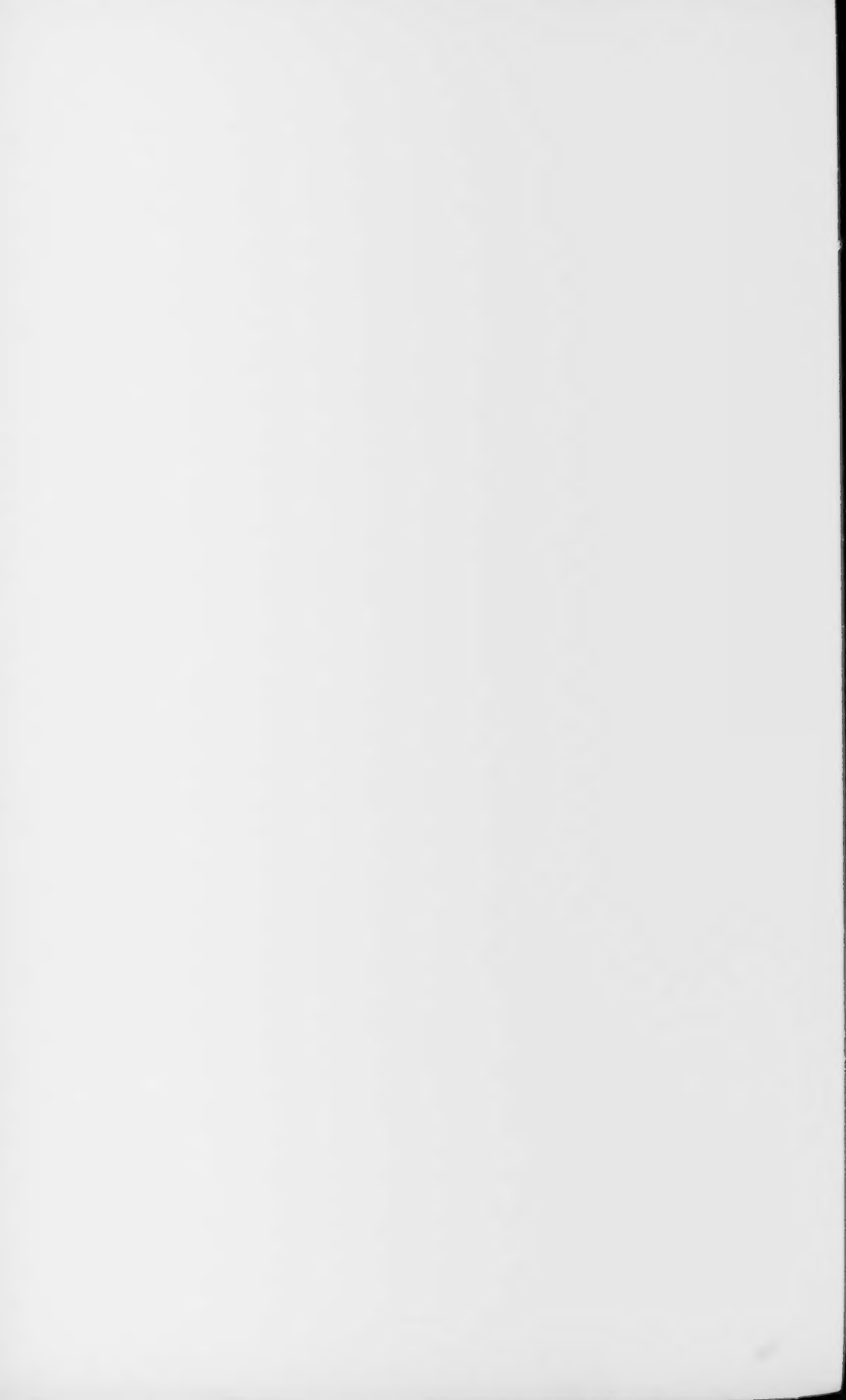
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

NANCY CROWDER,)	(
Individually and as)	(
Independent Execu-)	(
trix of the Estate)	(
of JAMES RALSTON)	(
CROWDER,)	(
)	(
Plaintiff,)	(
)	(
V.	)	(	CIVIL ACTION NO.
	)	(	TY-81-386-CA
KEN SINYARD, ET AL.)	(
)	(
Defendants.)	(

MEMORANDUM OPINION

In this civil action brought under 42 U.S.C. §1983 the motions of seventeen defendants for judgment notwithstanding the verdict or for new trial are pending. Plaintiffs Ralston and Nancy Crowder sued three counties, two cities, two sheriffs,



two prosecutors, a police chief, an F.B.I. agent, a deputy police chief, two state police investigators, two deputy sheriffs, and two municipal police officers, following a search of the Crowder Insurance Agency in Texarkana, Texas (purportedly authorized by a search warrant) on January 27 and 28, 1981. Present at the search were representatives of local jurisdictions in both Texas and Arkansas. After fourteen days of trial, a jury found that five individual defendants violated the Fourth Amendment by intentionally searching for property neither listed on the search warrant nor in plain view. The jury found seven additional individuals liable for interference with the Crowders' constitutional right of access to the courts, specifically, by transporting seized property from Texas to Arkansas, beyond the jurisdiction of local Texas



courts. None of the individuals were found qualifiedly or absolutely immune by the jury; each city and county was also held liable. Compensatory damages totaling ninety thousand dollars were awarded against the individual and governmental defendants. Punitive damages of \$1,000.00 were assessed against each of the twelve individuals found liable for one of the two constitutional violations.

In their post-trial motions, all defendants contend that the Crowders suffered no constitutional injury during or after the search. Both prosecutors demand judgment on claims of absolute quasi-judicial immunity, whereas qualified immunity is asserted by the remaining individuals. The cities and counties attack the jury's governmental liability findings both on factual and legal grounds. Finally, all defendants protest



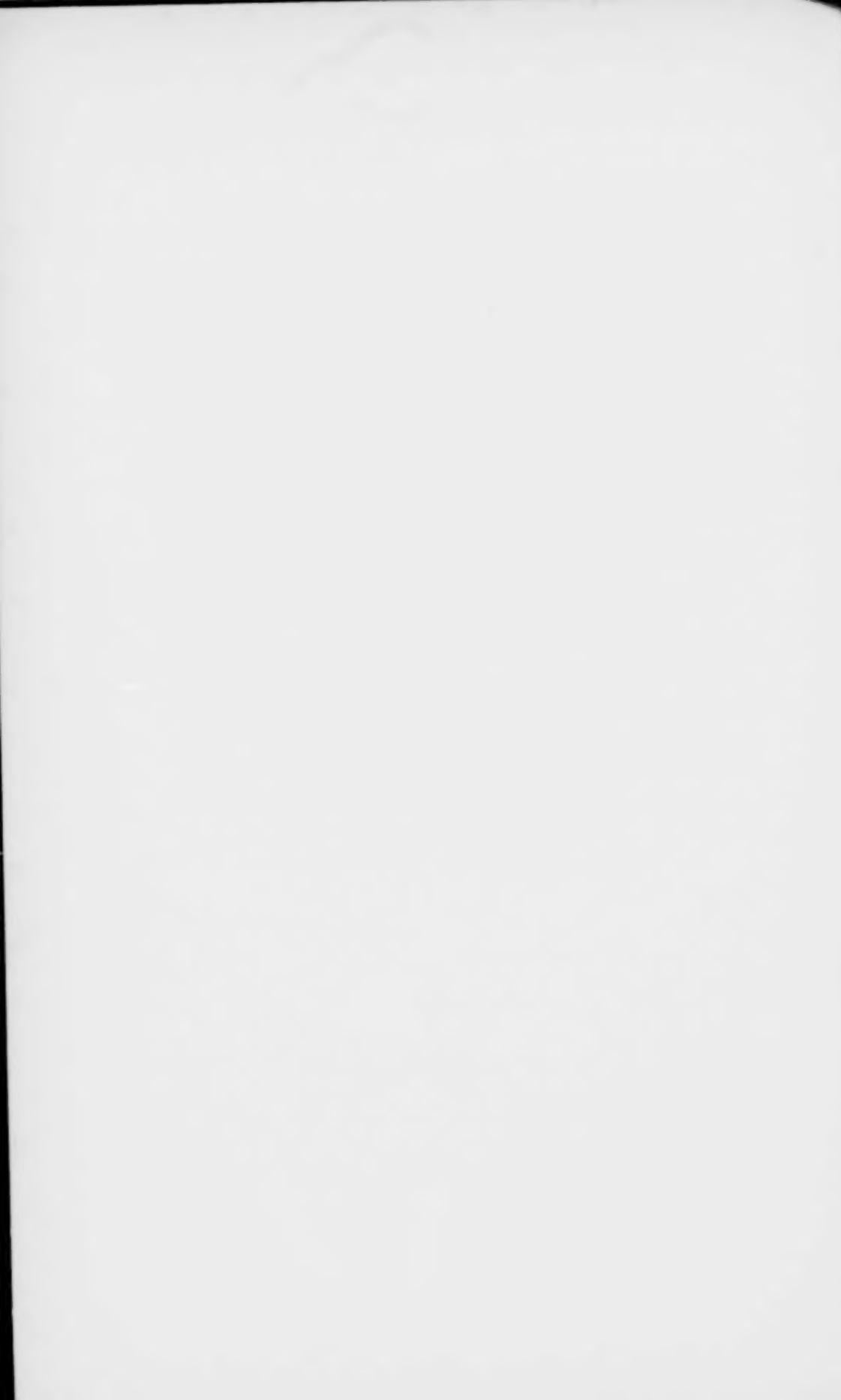
as factually unsupported the jury's award of compensatory and punitive damages. After a summarization of the facts, this opinion will give consideration to whether the jury legitimately found the defendants to have acted in violation of Section 1983, defendants' claims to individual immunity, whether the five governmental bodies were properly held liable, and defendants' attack on the damages assessed by the jury.

I. Facts

On January 27, 1981, at approximately 9:00 a.m., David Godwin, Sheriff of Sevier County, Arkansas, and Bill Jones, Chief of Police in DeQueen, Arkansas, the Sevier County seat, left DeQueen in the company of Terry Broyles, a prisoner in their custody. They drove to the state police district headquarters in Hope, Arkansas, there to administer a polygraph test to Broyles, whom Jones and

Godwin suspected of involvement in a recent DeQueen burglary. Also at district headquarters that day was H. L. Phillips, deputy sheriff of Miller County, Arkansas, in which the city of Texarkana, Arkansas is located. Phillips, Jones, and Godwin discussed similarities between several residential burglaries, then under investigation, in Sevier and Miller counties. Godwin had previously sent Phillips stolen property reports from at least two of the Sevier County burglaries.

While in Hope, Broyles told Phillips that James R. Bradshaw and John Scott Wilson had carried out residential burglaries in the Southeast Arkansas area. Upon telephoning the Miller County Sheriff's Department to ascertain the pair's whereabouts, Phillips learned that Bradshaw was absent without leave from the United States Navy, and was currently



in the custody of the Texarkana, Texas police department. Phillips, Godwin, and Jones decided to interrogate Bradshaw in Texarkana. Two Arkansas state police investigators -- Charles Lambert and R. S. Neal -- were assigned by their lieutenant in Hope to assist the other Arkansas officers traveling to Texas.

Lambert and Neal arrived at the Criminal Investigation Division (CID) of the Texarkana, Texas, Police Department at approximately 4:00 o'clock that afternoon. Jones and Godwin -- with Broyles still along -- arrived shortly thereafter in Godwin's car at roughly the same time as Phillips. While the other four officers interrogated Bradshaw, Jones drove Broyles to the Miller County Sheriff's Department for questioning by Deputy Sheriff Allen Jordan of Miller County. Broyles and Bradshaw each told a similar story: that along with three



other men, they had burglarized residences in Miller, Sevier, and Pike Counties, Arkansas; and that Broyles and Bradshaw had sold some stolen jewelry and silverware to J. R. Crowder of Texarkana, Texas.

Sergeant Gary Adams was the ranking officer at the Criminal Investigation Division of the Texarkana, Texas Police Department that evening. Captain Charles Campbell, Adams' supervisor and head of the C.I.D. had answered Miller County's afternoon inquiry about Bradshaw and, before going home at 4:00 o'clock, directed Adams to assist the Arkansas policemen as needed. A decision was made -- at least formally by Adams but with the participation of the Arkansas officers, including Jones -- to obtain a search warrant for the Crowder Insurance Agency, where Broyles and Bradshaw allegedly had sold stolen property to J.

R. Crowder. Adams decided to ask Assistant District Attorney James Elliott of Bowie County, Texas -- the county containing Texarkana, Texas -- for help in drafting an affidavit in support of a search warrant and in procuring the warrant. Unable to reach Elliott, Adams telephoned Captain Campbell at approximately 6:30 p.m. Campbell asked Adams whether there was probable cause to search, received an affirmative answer, and then telephoned Louis Raffaelli, Bowie County District Attorney, who located Assistant District Attorney Elliott and dispatched him to the C.I.D. Campbell played no role in subsequent events.

Assistant District Attorney Elliott arrived at the C.I.D. at approximately 9:00 p.m. He interrogated Bradshaw, asked that Broyles be brought back from the Miller County jail, and afterwards

questioned Broyles. Elliott also conferred at length with Godwin, Jones, Adams, Lambert, and Miller County Sheriff Ken Sinyard, who had joined the group by that point. Believing there was probable cause to search, Elliott drafted an affidavit which Phillips signed. In that affidavit, the property to be sought was described as

One round pocket watch, Elgin on face; One coin collection consisting of gold and silver American and foreign coins, 25 or 30 of which are in plastic packets; One Indian head penny, gold plated; One money clip with dollar sign on it; and one piece of paper kept in his desk on his office on which are certain figures (\$500 minus sums of \$10 and similar sums) which said paper is used to keep an account of a sum of money owed by Jimmy Bradshaw to J. R. Crowder for the sale of stolen property.

Attached to the affidavit is the following signed statement: "On January 23, 1981, I Richard Terry Broyles, along with Eddie Fears took some silver and gold



items from the Hardin and Davis residence in Sevier County, Arkansas. We then took the items to 615 Olive, Texarkana, Texas where we sold them to J. R. Crowder for the sum of slightly over \$500.00 dollars." A justice of the peace came to the C.I.D. office and issued a form warrant for J. R. Crowder's arrest, and for a search of the insurance agency, at 10:59 p.m.

Shortly after 11:00 p.m., Bowie County District Attorney Raffaelli entered the C.I.D. building, as the officers, in company with Assistant District Attorney Elliott, were exiting it. At Adams' request or invitation, each of the assembled police officers had elected to attend the search of the Crowder agency. Although neither was asked to participate, Raffaelli decided that he and Elliott would go to the scene of the search, and would travel in a

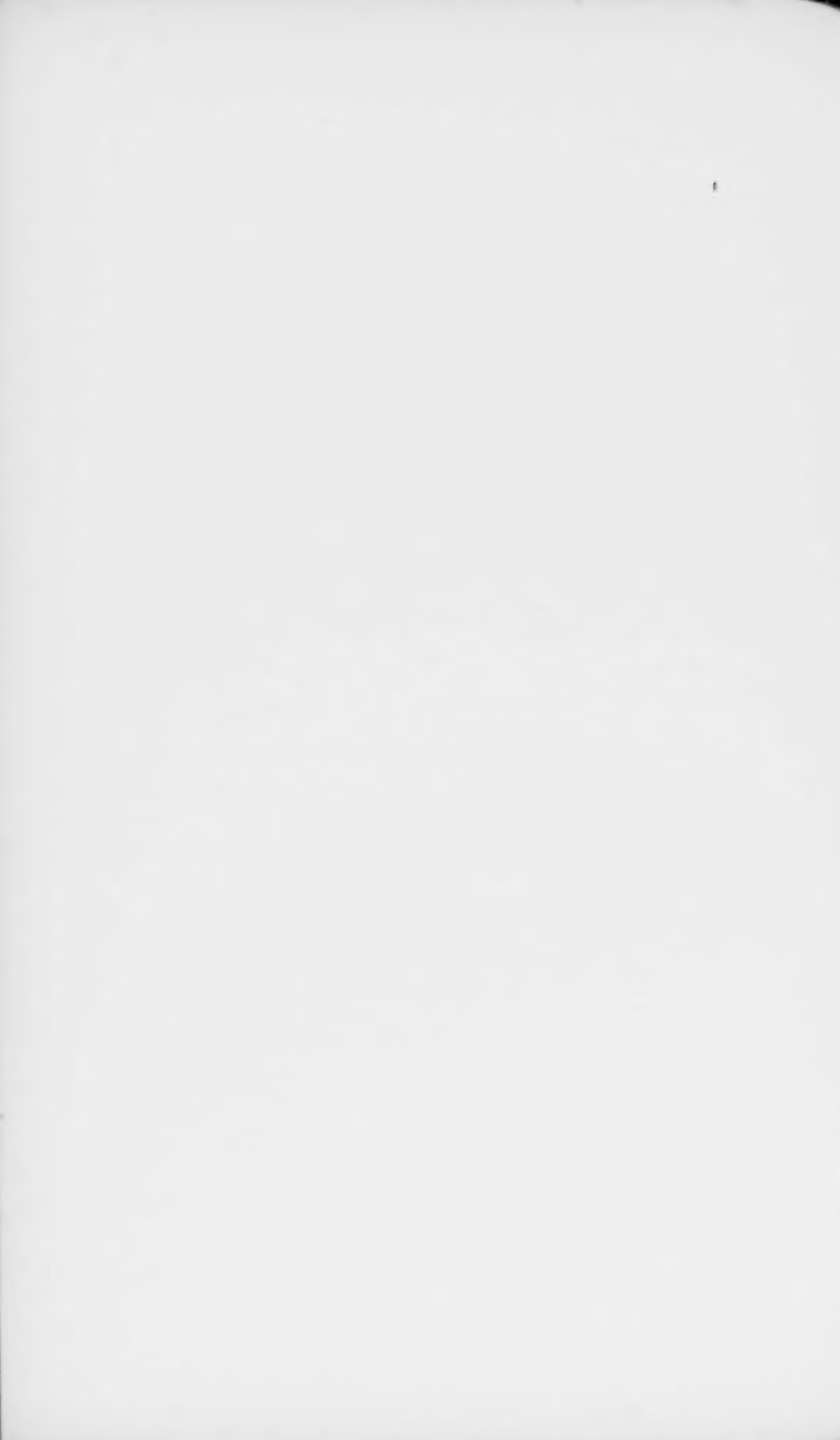


gives rise to liability, absent a valid claim of immunity, for interference with the substantive constitutional right of access to the courts.

"Under Texas law, an officer in possession of property alleged to have been stolen cannot release the property except upon the order of a court or magistrate." Snell v. Short, 544 F.2d 1289 (5th Cir. 1977)(construing Art. 47.01, Texas Code of Criminal Procedure); accord, Murray v. Lyons, 95 S.W. 621 (Tex.Civ.App. 1906, no writ). Article 18.11 of the Code provides that property seized under a warrant "shall be safely kept by the officer seizing the same, subject to the further order of the magistrate." This language imposes a mandatory duty on ~~the~~ seizing policeman. See Reimer v. Smith, 663 F.2d 1316, 1320 (5th Cir. 1981). Fealty by an officer to the magistrate's authority over seized

marked police cruiser.

Sergeant Adams accompanied by C.I.D. Officer Louis Aycock and the two burglars, went to the Crowders' home and knocked on the door. James Ralston Crowder (then seventy-four years old) and his wife, Nancy Crowder (also aged), were awakened by the knock. Crowder carried a pistol in his hand as he approached the door. While Adams was in the process of identifying himself and Aycock as policemen, Crowder inadvertently discharged a round from his gun into the floor. Aycock persuaded James Ralston Crowder, who was by then quite shaken, to hand the pistol to Nancy Crowder. Adams brought the two burglars, Broyles and Bradshaw, into the house to identify James Ralston Crowder, and for Crowder to acknowledge them. James Ralston Crowder was then asked -- or "instructed" -- to get dressed, drive to his office, and



open the agency for execution of the search warrant. Throughout this encounter at the Crowder home, Raffaelli, Elliott, and a uniformed policeman were parked at the curb outside the house.

Adams, Aycock, and James Ralston Crowder entered the agency at 11:30 p.m., followed shortly by Miller County Deputies Jordan (guarding Broyles) and Phillips; Sevier County Sheriff Godwin; Miller County Sheriff Sinyard; DeQueen Chief of Police Jones; and Arkansas Investigators Charles Lambert (guarding Bradshaw) and Neal. Raffaelli and Elliott parked outside the building, but they soon departed on a personal errand. There then ensued a three-hour search of the Crowder Insurance Agency. Raffaelli and Elliott, who had returned, participated in the search during the last sixty to ninety minutes.

After entering the agency, Crowder



went to his desk, removed a piece of paper resembling the sheet described in the affidavit, and handed the paper to Adams. At this point, the sequence and nature of events is increasingly disputed, and conflicts between the searching officers' respective testimonies multiply. Aycock soon stationed himself at a second desk, located in the hallway outside Crowder's office. Also adjacent to that hallway was the "file room," containing several heavy locked file cabinets designed for security. Sergeant Adams, and possibly Jones and Godwin, gathered jewelry, coins, and other objects from various locations in the agency. These items were deposited on the desk manned by Aycock. By midnight, Phillips testified, he had noticed on the desk, a ring fitting a stolen property description Phillips had received from a Miller County burglary.



At that juncture, Phillips contacted the Miller County Sheriff's Department -- approximately eight blocks distant -- and had a deputy deliver two or more "lists," or stolen property reports, which Phillips wished to check against the items displayed on the desk. Among the lists may have been the Sevier County reports previously supplied to Phillips by Sheriff Godwin.

Several officers searched in the "file room." Adams spent approximately ninety minutes looking into the "file safes" and removing their contents. Jones, Godwin, Sinyard, Phillips, Jordan, and Charles Lambert also looked into file drawers and inspected objects in the room. Godwin, Jones, and Phillips each testified -- by deposition or at trial, or both -- that they were searching (in the file room and elsewhere in the office) for numerous large silver items:

goblets, platters, bowls, and silverware, which were not listed on the affidavit. These objects had been reported stolen in burglaries other than the two episodes -- involving Davis and Hardin -- mentioned by Broyles in the statement attached to Phillips's affidavit. Jones carried a list of thirty or more items taken in the "Kelsey Moore burglary" in DeQueen; Godwin was "hunting big silver" lost by the Danielses and the Wards, two other burglarized Sevier County families. Phillips's initial and continuing interest in the Texarkana connection was sparked by Broyles's charge that Bradshaw and Wilson had committed burglaries in Miller County, Arkansas; at deposition, he testified that he participated in the search in order to check items at the agency against stolen property reports from Miller County burglaries. (Several witnesses reported



that Phillips "worked from a list" at the desk in the hallway on which property was dumped for inspection.) Jones, Godwin, Sinyard, Phillips, Charles Lambert and Assistant District Attorney Elliott further testified that their purpose, before and during the search, had been to return stolen property to Arkansas.

Phillips identified which items would be taken from the scene, and Aycock, at the desk, placed them in a paper or plastic sack. Some forty-six untagged items were bagged (and ultimately removed) in this fashion. According to District Attorney Raffaelli, Sheriff Sinyard wanted also to seize smelted items -- presumably gold and silver ingots which were located in the file safes -- in the belief that they may have been refined from stolen property. Raffaelli vetoed this suggestion.

The search ended abruptly, at

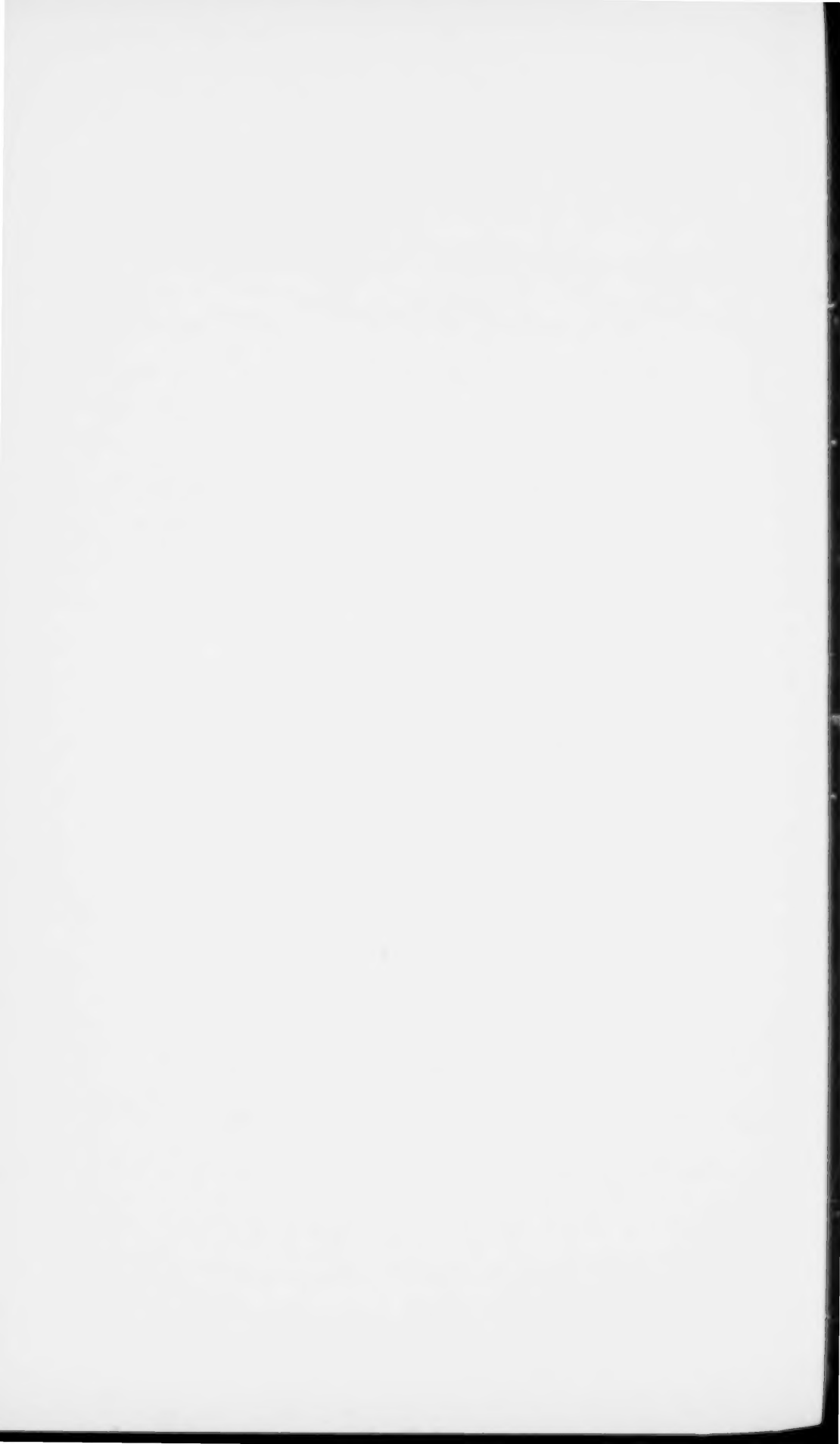
approxately 2:30 o'clock a.m. on January 28, when Crowder's attorney arrived with a video cameraman. (Sergeant Adams, the videotape showed, had picked up the sack of seized property and departed at that time.) At the scene of the search, Crowder's attorney asked several questions regarding the seizure and disposition of the property taken. Raffaelli and Elliott each testified that they informed the lawyer that his questions could most appropriately be answered at a judicial hearing the next day, as provided by the Texas Code of Criminal Procedure. At 3:01 a.m., however, Phillips -- with Raffaelli's blessing -- signed a receipt for the property at C.I.D. and left for Miller County, Arkansas.

Raffaelli, and Assistant District Attorney Elliott, testified that they participated solely as legal advisors. Some of the searching officers, however,



identified Elliott as the person in charge of the evening's activity. Raffaelli, according to his own testimony, "authorized" removal of the bagged property to Arkansas. This authorization was given to Sinyard early in the search. Phillips and Aycock then inventoried the seized items between 2:30 ad 3:00 a.m., at the CID. During that interval, Raffaelli reiterated his authorization to Sinyard to remove the property.

In response to a 1981 Texas state court and a 1982 federal court order -- both directing return of the seized property from Arkansas to Bowie County, Texas -- Raffaelli and Elliott offered the excuse that they were unable to effect the return of property, since it was not in their custody or control. The Arkansas defendants refused to return the property when asked -- in a single 1981 telephone call -- to do so by Raffaelli



or Elliott. However, they produced sixteen of the forty-six items following the 1982 federal court order.

II. Fourth Amendment Violation

Of the forty-six items which were seized during the search in question, four were described in the search warrant. The jury found six of the remaining forty-two to have been seized pursuant to the plain view doctrine. It further found that defendants Sinyard, Phillips, Godwin, Jones, and Charles Lambert intentionally searched the Crowder agency for property not described by the warrant.

"A general, exploratory search through personal belongings is the precise evil sought to be eliminated by the Fourth Amendment's requirement that things to be seized and places to be searched be described with particularity." Creamer v. Porter, 754 F.2d 1311,



1318 (5th Cir. 1985). In this action the sole relevant exception to that requirement was the plain view doctrine. A legitimate plain view seizure takes place when an officer is lawfully present, the evidence seized is clearly incriminating, and discovery of the evidence is to some degree inadvertent. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Arizona v. Hicks, 107 S.Ct. 1149, 1157 (1987) (O'Connor, J., dissenting on other grounds). "[I]nadvertence does not require the police to be totally dumb-founded or surprised by the discovery of the incriminating evidence; the fact that its presence may be 'within the realm of foreseeable possibilities,' [United States v. Antill], [615 F.2d 648, 649 (5th Cir.) cert.denied, 449 U.S. 866 (1980)] or even expected, does not destroy inadvertence if the police did not arrive specifically planning to look

for the evidence." United States v. Freeman, 685 F.2d 942, 954 n.7 (5th Cir 1982) (emphasis added).

Sinyard, Godwin, Jones, and Phillips all testified to commencing the search in hopes of finding property, stolen in their respective Arkansas jurisdictions, that did not figure in Phillips's affidavit in support of the search warrant and was not listed on the warrant. Godwin testified at trial that he was "hunting big silver"; Jones, Phillips, and Sinyard stated at depositions -- with which they were impeached on the witness stand at trial -- that they searched the Crowder agency with property lists in hand. All but Lambert testified to their express intent, before and during the search, to seek dozens of items not listed in the warrant; under the circumstances the jury also could have inferred that

Lambert -- who had investigated the Moore and Daniels burglaries, and peered into file drawers out of alleged "curiosity" -- arrived with a similar purpose in mind.

This intentional conduct is inconsistent with the degree of inadvertency required to establish a plain view seizure. See id. at 954 n.7 (collecting cases). Hence, the jury properly concluded that defendants deprived the Crowders of their Fourth Amendment right not to be subjected to a general search.

III. Access to Courts

The jury found that defendants Phillips, Jordan, Sinyard, Adams, Campbell, Raffaelli and Elliott violated plaintiffs' constitutional right of access to the courts. Each defendant was identified, by the jury, as having been directly responsible for removing the seized property to Arkansas. "Any



deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation." Jackson v. Procunier, 789 F.2d 307, 311 (5th Cir. 1986). Plaintiffs' theory of the case was that removal of the property across the border destroyed or impaired the rightful jurisdiction of Texas courts over the seized items, thus interfering with their ability to litigate ownership of the property in Texas.

A. Procedural Due Process

Defendants contend that the Crowders' efforts to adjudicate ownership of the property were thwarted by plaintiffs' own failure to join Arkansas officials in control of the property as parties to their 1981 state court action. A properly litigated claim, defendants suggest, could have afforded eventual relief. Defendants' argument that some form of judicial relief remained avail-

able to the Crowders -- even after the property crossed state lines -- implicitly characterizes their access claim in procedural due process terms. Under Parratt v. Taylor, 451 U.S. 527 (1981) the existence of an adequate post-deprivation remedy, such as a tort action, precludes litigating a loss of property under the Fourteenth Amendment and Section 1983. But "Parratt applies only when the plaintiff alleges a deprivation of procedural due process; it is irrelevant when the plaintiff has alleged a violation of some substantive constitutional proscription." Augustine v. Doe, 740 F.2d 322, 329 (5th Cir. 1984); see also Martin v. Dallas County, Texas, 822 F.2d 553, 555 (5th Cir. 1987); Hudson v. Palmer, 468 U.S. 517, 541 n.4 (1984) (Stevens, J., concurring in part).

The Court of Appeals for the Fifth Circuit has defined access to the courts

as a substantive constitutional right, rooted in the Privileges and Immunities Clause of Article IV, the Petition Clause of the First Amendment, and the Fourteenth Amendment. Ryland v. Shapiro, 708 F.2d 967, 971-71 (5th Cir. 1983); see also Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986). Thus, as a substantive right, it is not subject to Parratt's limitations on procedural due process claims. Jackson v. Procunier, 789 F.2d at 309; accord, Morello v. James, 810 F.2d 344 (2nd Cir. 1987)(collecting cases).

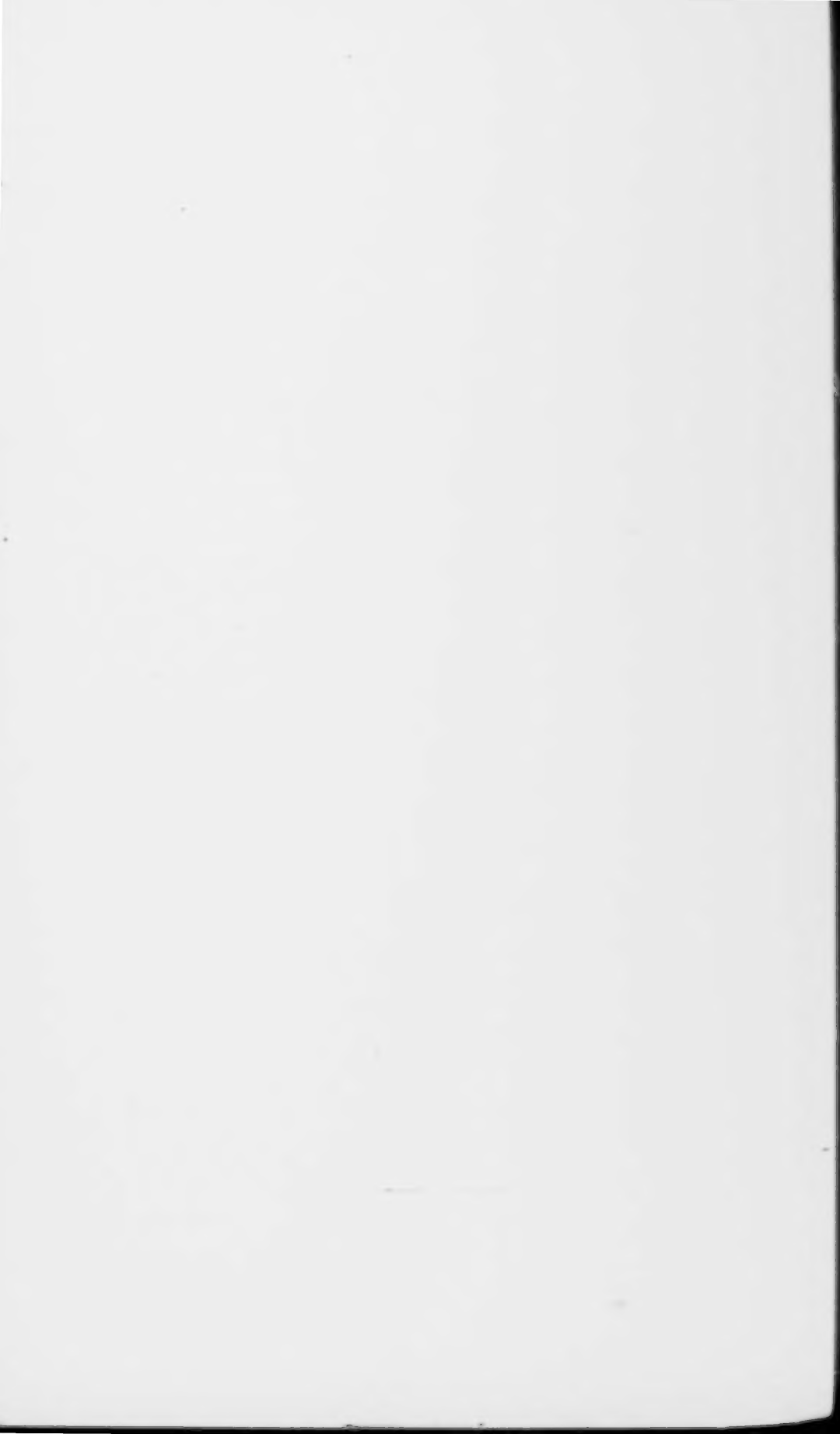
B. Access to State Court

The jury was instructed that Texas law provides citizens claiming ownership of seized property the right to litigate ownership in state court. They were further instructed that preventing, or interfering with, an individual's ability to invoke or enforce state court remedies



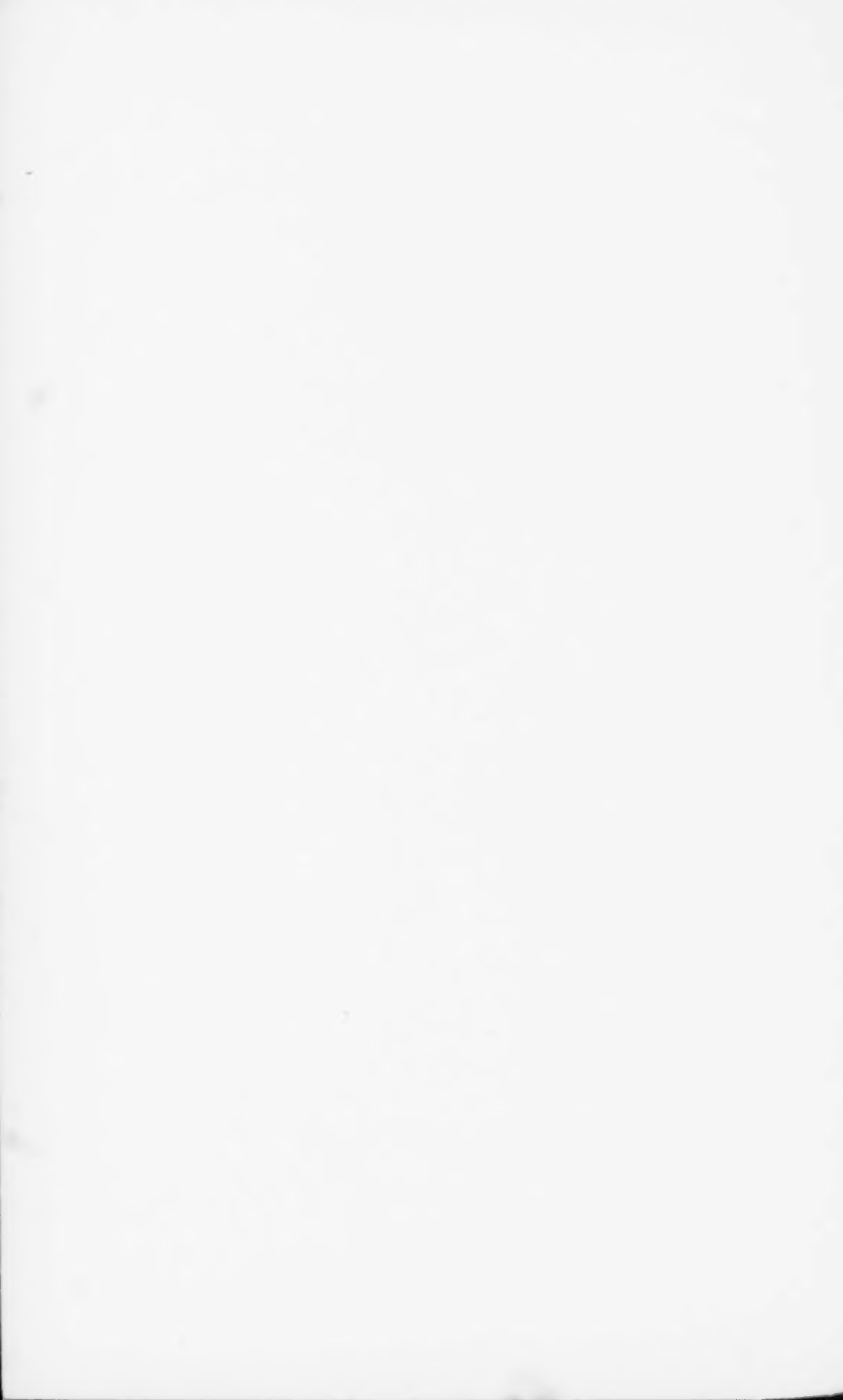
gives rise to liability, absent a valid claim of immunity, for interference with the substantive constitutional right of access to the courts.

"Under Texas law, an officer in possession of property alleged to have been stolen cannot release the property except upon the order of a court or magistrate." Snell v. Short, 544 F.2d 1289 (5th Cir. 1977)(construing Art. 47.01, Texas Code of Criminal Procedure); accord, Murray v. Lyons, 95 S.W. 621 (Tex.Civ.App. 1906, no writ). Article 18.11 of the Code provides that property seized under a warrant "shall be safely kept by the officer seizing the same, subject to the further order of the magistrate." This language imposes a mandatory duty on the seizing policeman. See Reimer v. Smith, 663 F.2d 1316, 1320 (5th Cir. 1981). Fealty by an officer to the magistrate's authority over seized



property merits unobstructed recourse to the courts, by property claimants such as the Crowders, under Articles 47.01a, 47.02, and 47.04.

Texas's statutory scheme for securing and disposing of seized property contemplates unbroken control over the res by Texas courts. In theory, pursuant to Articles 17.041-17.045 of the Texas Civil Practice and Remedies Code (the Texas Long Ar Statute) a Texas court might have exercised in personam jurisdiction over Arkansas tortfeasors whose offending acts took place in Texas. But the effectiveness of such jurisdiction would be impaired by the court's lack of direct control over the property. Among the compromising possibilities is the exercise of concurrent, conflicting jurisdiction by a foreign court bent on retaining the res. At trial, the Arkansas defendants alleged that an



Arkansas court order had left them unable, throughout the federal court litigation, to return the seized property to Texas. The Texas defendants blamed their failure to comply with Texas and federal court orders for the property's return on their counterparts in Arkansas, whose out-of-state possession of the property, the Texas officials admit, left them legally powerless to effect its return.

C. State of Mind Requirements

The Fifth Circuit has reserved the question of what state of mind is required with regard to violations of the right of access to courts. Jackson v. Procunier, 789 F.2d at 312 (discussing Davidson v. Cannon, 106 S.Ct. 668 (1986) and Daniels v. Williams 106 S.Ct. 662 (1986)). In Davidson the Supreme Court held that "the protections of the Due Process Clause, whether procedural or



substantive" are "not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property." 106 S.Ct. at 670, 671. But as a constitutionally enuerated substantive right -- one with textual bases outside the Fourteenth Amendment -- access to the courts differs, in important respects from unenumerated due process rights. See generally Daniels v. Williams, 106 S.Ct. at 677 (Stevens J., concurring in the judgment). The state of mind required to violate an enumerated right varies according to the text, history, and function of the constitutional provision in question. State of mind requirements cannot be transferred mechanically between disparate constitutional guarantees. Baker v. McCollan, 443 U.S. 137, 139-40 (1979). An enumerated right may imply no state of mind requirement or -- at the other extreme --

a very particular and stringent one.

Although decided in the shadow of Daniels and Davidson, Jackson raises the threshold of requisite intention very little, if at all. Whereas Ryland v. Shapiro held that "any interference with a substantive constitutional right, such as the right of access to courts, may by itself amount to a constitutional deprivation," 708 F.2d at 975, Jackson v. Procunier states that "[a]ny deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation." 789 F.2d at 111. The appending of "deliberate" to "any" might be read to imply a new heightened state of mind requirement for access to court cases. Nonetheless, this court is persuaded that such an interpretation would be incorrect, and that its instructions to the jury, and the jury's verdict on the access issue, reflect the



concept of "deliberate impediment" as employed in Jackson.

Jackson, like Ryland, stressed that access to court is a right derived from sources other than the Fourteenth Amendment. Significantly, Daniels did "not rule out the possibility that there are other constitutional provisions [than the Due Process Clause of the Fourteenth Amendment] that would be violated by mere lack of care" 106 S.Ct. at 666. One of the two cases cited in support of Jackson's "deliberate impediment" formulation is Ryland, which imposed no state of mind requirement for violation of the right of access to court. The other is Crews v. Petrosky, 509 F.Supp. 1199 (W.D.Pa. 1981), which held that "[a]n allegation that a clerk of state court has negligently delayed the filing of a petition for appeal, and that the delay has interfered with an

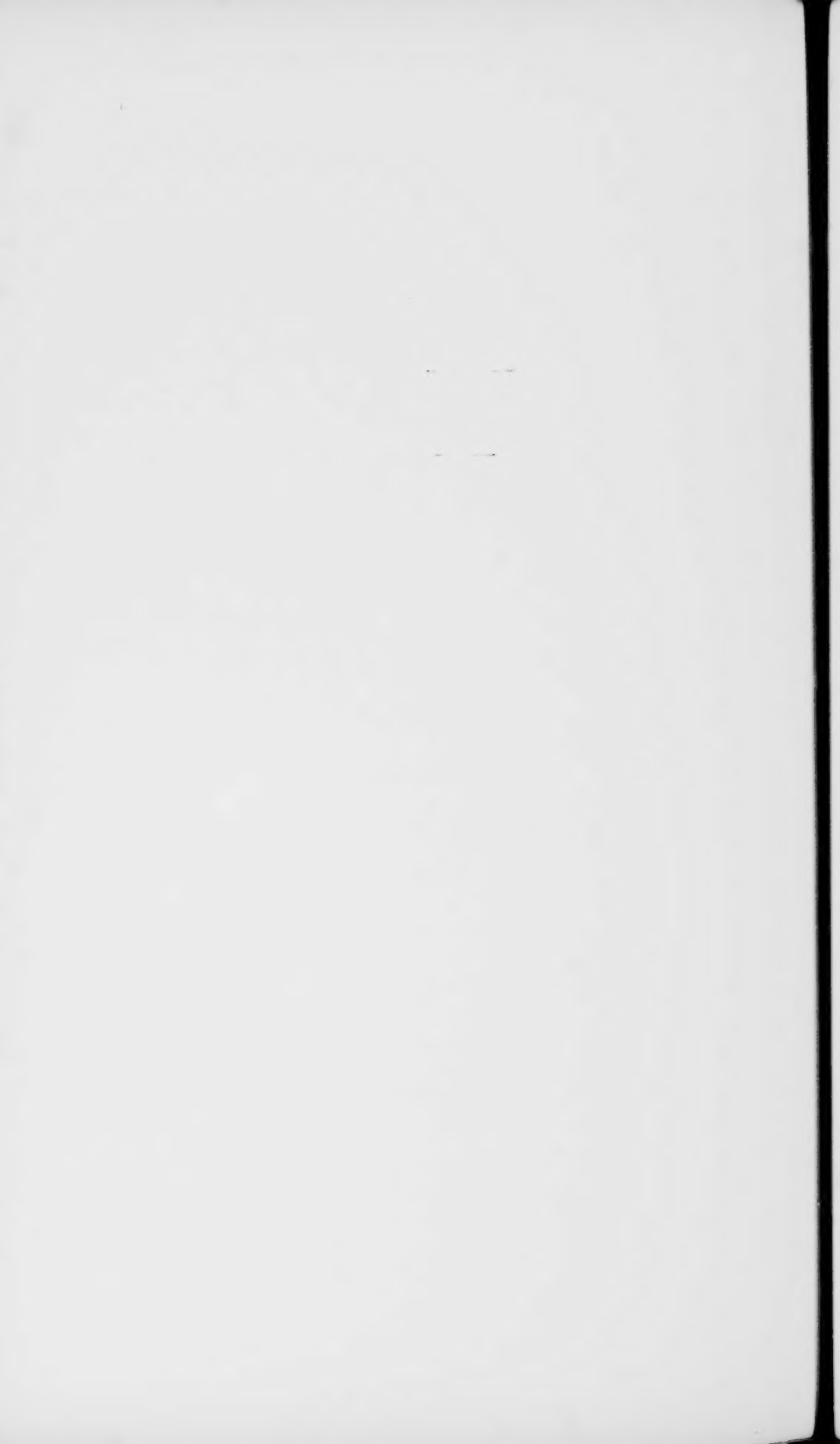
individual's right of access to the courts, may state a cause of action under 42 U.S.C. §1983." Id. at 1204 (emphasis added).

In the Crowder case, the jury heard considerable testimony suggesting something more than negligence on the part of Adams, Phillips, Sinyard, Raffaelli, Elliott, and Jordan: deliberate acts that impaired, predictably and profoundly, the Crowders' ability to employ ordinary and effective state court procedures. Adams, on statutory notice to retain seized property subject to local court order, released it for removal beyond the court's jurisdiction; Raffaelli authorized Adams to do so; Elliott orchestrated the search with this outcome in mind; Sinyard asked Raffaelli early in the search for permission (granted then and later to Phillips) to take the property to Arkansas; Miller



County Deputy Jordan worked closely with Sinyard and Phillips throughout the search and the jury's determination that he directly contributed to the access denial should stand. The jury's verdict with regard to these defendants -- phrased in terms of direct responsibility for removal of the property beyond the jurisdiction of the Texas courts -- comports with Jackson and the precedents on which Jackson relies.

The jury's verdict against Captain Campbell however, must be set aside as a matter of law. There was no evidence that Campbell, who was not shown to have been aware of any previous, similar unconstitutional behavior by Adams, was grossly negligent, nor was there evidence of more than a negligent failure to prevent Adams' unconstitutional acts. Supervisory liability under §1983 cannot be imposed on the basis of simple

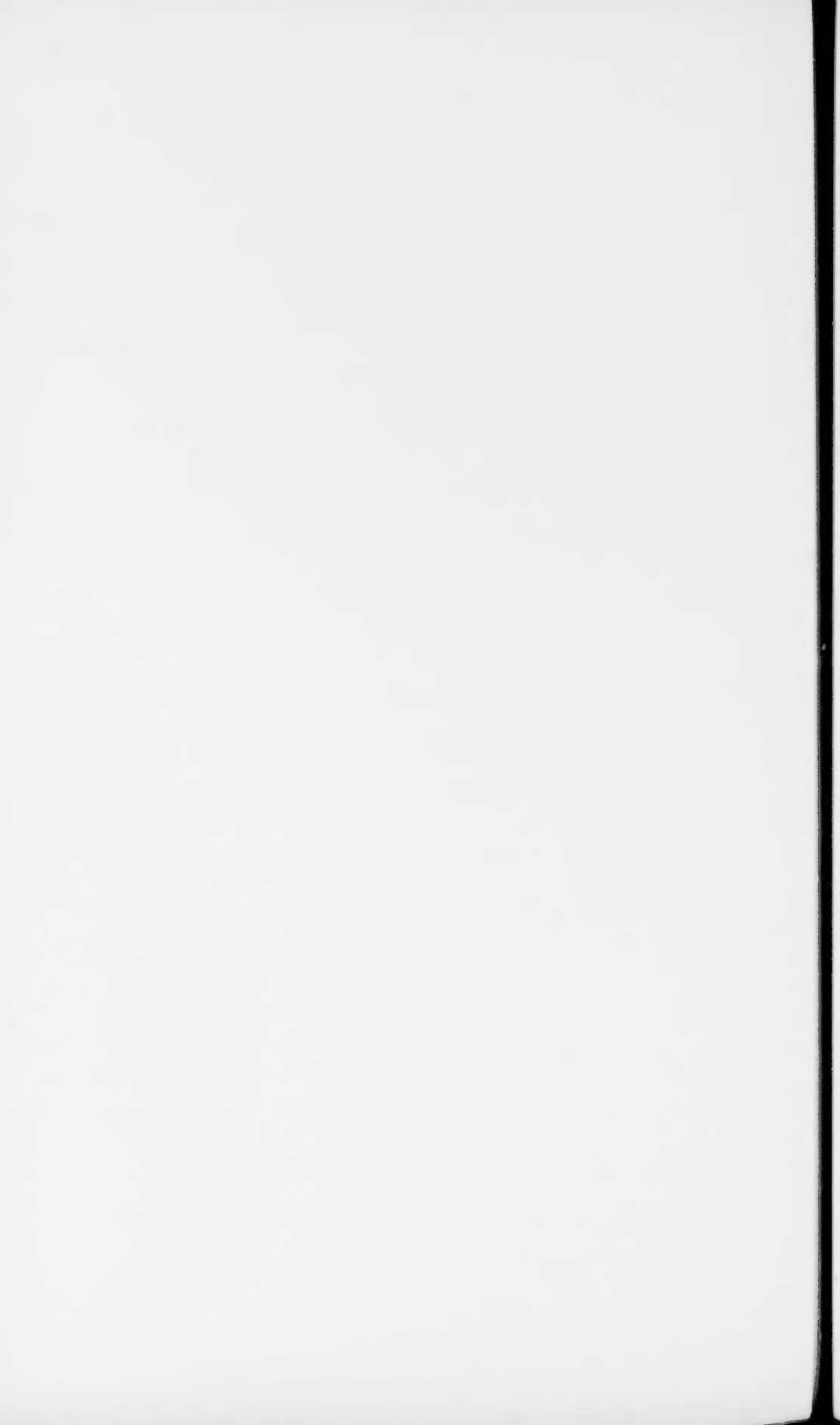


negligence, see Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984) or a negligent failure to adopt policies that would have prevented the harm suffered by a plaintiff. See Reimer v. Smith, 663 F.2d 1316 (5th Cir. 1981).

IV. Individual Immunity

A. Fourth Amendment

The five defendants held liable for violating plaintiffs' Fourth Amendment rights contest the jury's rejection of their qualified immunity defense. Their specific arguments are directed, almost without exception, to whether a Fourth Amendment right of the Crowders was in fact violated. Regarding qualified immunity, however, the relevant inquiry is whether the officers' actions, although unlawful were objectively reasonable under the facts of the case. Anderson v. Creighton, 107 S.Ct. 3034



(1987). The objective reasonableness of official action, for qualified immunity purposes, turns in large part on the clarity or obscurity of the federal right violated. Policemen, like other governmental actors, are liable only for violations of "clearly established law" Harlow v. Fitzgerald, 457 U.S. 800 (1982). Liability cannot be premised on interference with a right so novel or unformed as to be beyond the ken of a hypothetical, reasonably well-informed policeman.

In this action, the five defendants' entitlement to qualified immunity turned on "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the searching officers possessed." Anderson, 107 S.Ct. at 3040. The Fourth Amendment warrant



requirement -- intended by the framers to prevent the kind of unbounded, general searches that proved so oppressive to the American colonists -- is not new. The plain view doctrine and its limits, are similarly familiar parts of our legal terrain. See pp. 10-11, supra.

Not every violation of these venerable principles will support a \$1983 action against the searching officer, however. Anderson specifically cautions against according "clearly established" status to rights in the litigation at such a high level of generality that defendants are unable to escape their universal application. Every government official for example, should know that all persons are entitled to due process of law; but if the fundamental nature of due process means that its every application is "clearly established," then every due process violation -- however

murky or unusual the circumstances under which it takes place -- would preclude qualified immunity for the officials involved. This result would frustrate the purposes of qualified immunity: preventing paralysis and penalization of officials who must take action in ambiguous legal and factual contexts. Accordingly, the clarity of the right violated must be assessed in the specific context of the search, not assumed as a general omnipresent proposition of law.

Does this mean then, that basic constitutional protections -- phrased in general terms because intended for broad application -- are now the least likely to pass muster for qualified immunity purposes? "To state the proposition is to assure its rejection." Lynch v. Cannatella, 810 F.2d 1363, 1375 (5th Cir. 1987) (previously unadjudicated due process right of illegal aliens to be



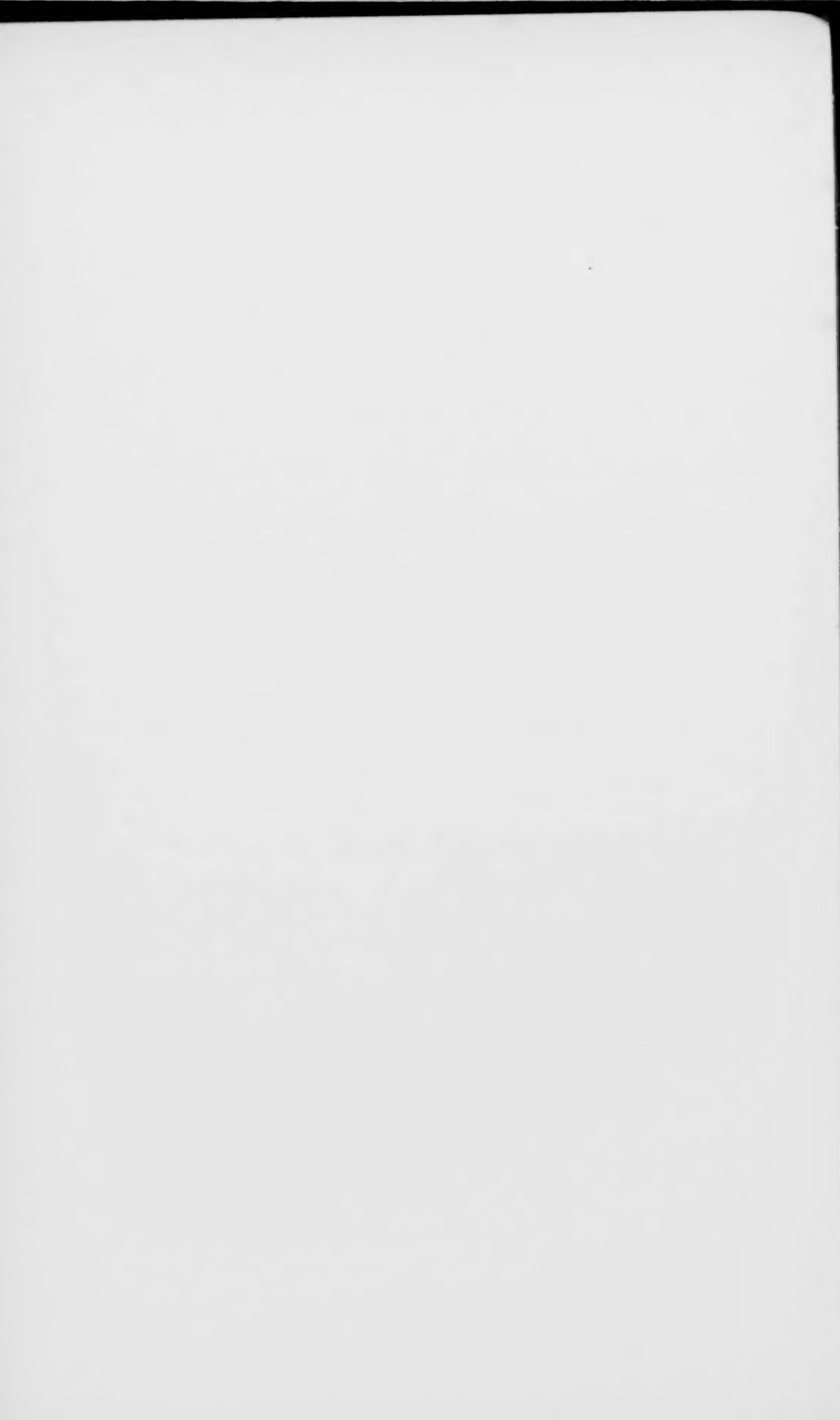
free from gross physical abuse held clearly established). The right to be free from general searches has not been read out of §1983 by Anderson. See Emery v. Holmes, 824 F.2d 143, 149-50 (1st Cir. 1987) (John R. Brown, Senior Circuit Judge, sitting by designation).

When a police officer asserts the defense of qualified immunity, the burden of proof shifts to the plaintiff -- who must as an initial matter show that the right violated was clearly established at the time in question. Whatley v. Philo, 817 F.2d 19 (5th Cir. 1987). This plaintiffs have done: the warrant requirement and its limited exceptions were clearly established in 1981. Under Anderson, the plaintiff must also take some account in calculating objective unreasonableness, of the information known to the searching officers. Sinyard, Godwin, and Phillips simply

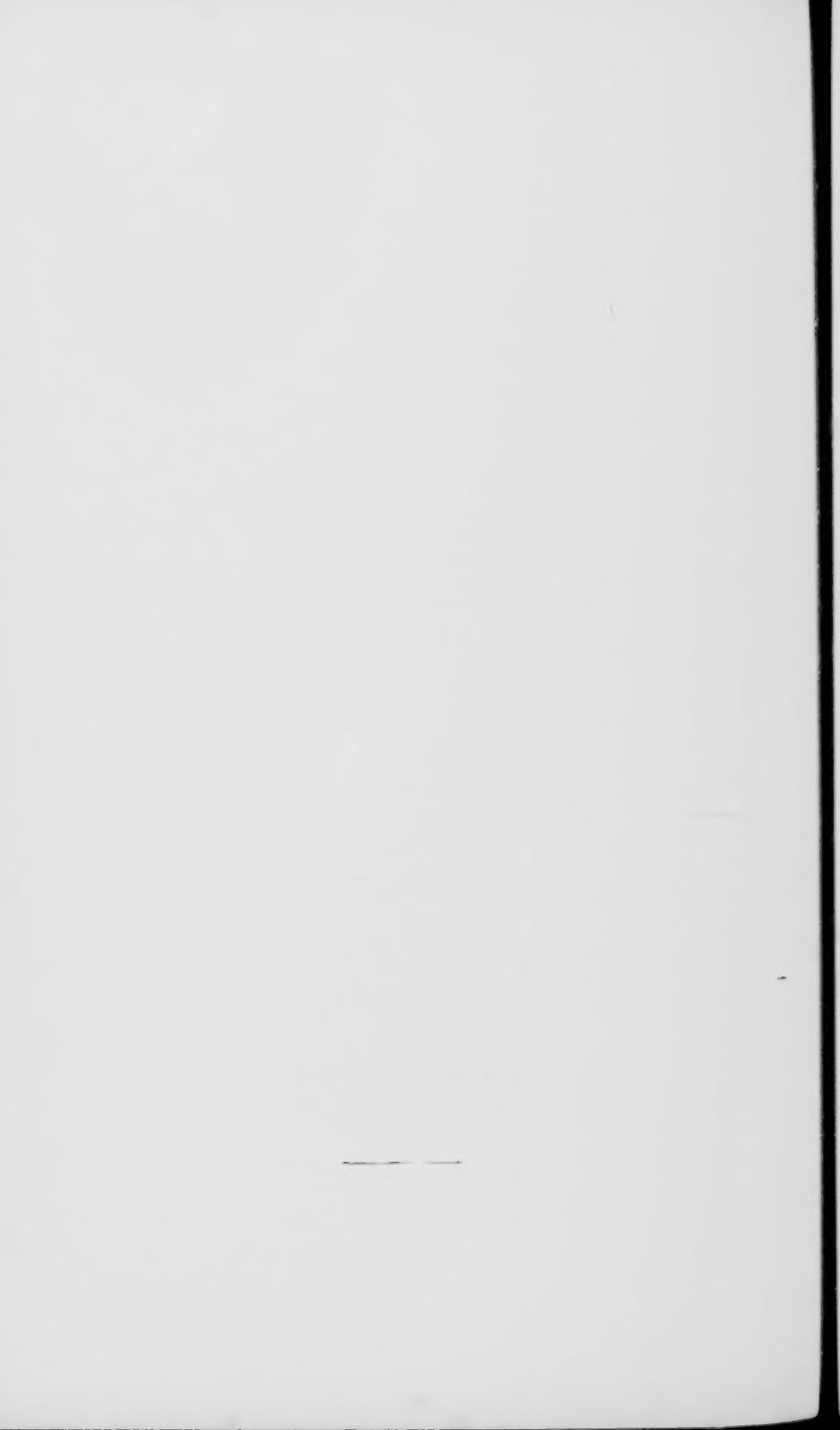


state that none should have known that any constitutional right of the Crowders was violated. At trial, however, each sought at length to distance himself from the search -- by claiming not to have read the warrant (Sinyard, Godwin) or to have offered only peripheral assistance at Sergeant Adams's request. Jones and Lambert made a similar claim: that they were "mere bystanders" within the meaning of Creamer v. Porter, 745 F.2d 1113 (5th Cir. 1985).

The jury was free to discount these protestations of ignorance and superfluity. Upon arriving at the scene, Sinyard, Phillips, Godwin, Jones, and Charles Lambert -- the jury reasonably could have concluded -- immediately began searching for dozens of items reported stolen in numerous burglaries about which the magistrate had never been apprized. Jones, Phillips, and Godwin



compared property called [sic] from throughout the agency with lists of items, reported stolen in various burglaries, which admittedly, they intentionally came to the Crowder premises to seek; Sinyard, an active participant, tried to widen the scope of the search even beyond its eventual bounds; and Charles Lambert, who had investigated the Moore and Daniels burglaries late in December 1980, peered into file drawers. It is one thing to rely in good faith on a warrant as far as that warrant goes; it is another to imply that a warrant, limited by definition, legitimizes all that occurs in its presence. "Law enforcement officers having a good faith and reasonable belief in the validity of the search warrant may nonetheless incur liability under [§ 1983], if the warrant is executed in an unreasonable manner." Duncan v. Barnes,



592 F.2d 1336, 1338 (5th Cir. 1979); see also Tarpley v. Greene, 684 F.2d 1, 9 (D.C.Cir. 1982). The testimony of all four officers revealed intentional, unconstitutional conduct under circumstances that would have put a reasonable police officer on notice that he had run afoul of the Fourth Amendment. See e.g. Creamer v. Porter, supra; Emery v. Holes, supra; Bergquist v. County of Cochise, 806 F.2d 1364, 1369 (9th Cir. 1986) (citing Duncan); cf. Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987) (post-Anderson unlawful arrest).

The jury specifically found that the officers' violation of clearly established law was not excused by extraordinary circumstances. See Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985). Thus the jury had a separate opportunity to consider defendants' claims to ignorance or bystander status.



None of the defendants is remotely comparable to the police officer in Creamer -- qualifiedly immune because he attended the search as a jurisdictional formality, and absent much of the time. All were jurisdictionally superfluous, and all played an active role throughout the search. Under the Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), standard, the jury's findings on qualified immunity should stand.

At trial, plaintiffs protested that qualified immunity issues are for the court, not the jury. This is the position of the Second, Sixth, and Seventh Circuit, and perhaps others. Stein v. Board of City of New York, 792 F.2d 13 (2nd Cir. 1986); Donta v. Hooper, 774 F.2d 716 (6th Cir. 1985), cert. denied, 107 S.Ct. 3201 (1987); Llaguno v. Mingey, 763 F.2d 1560 (7th

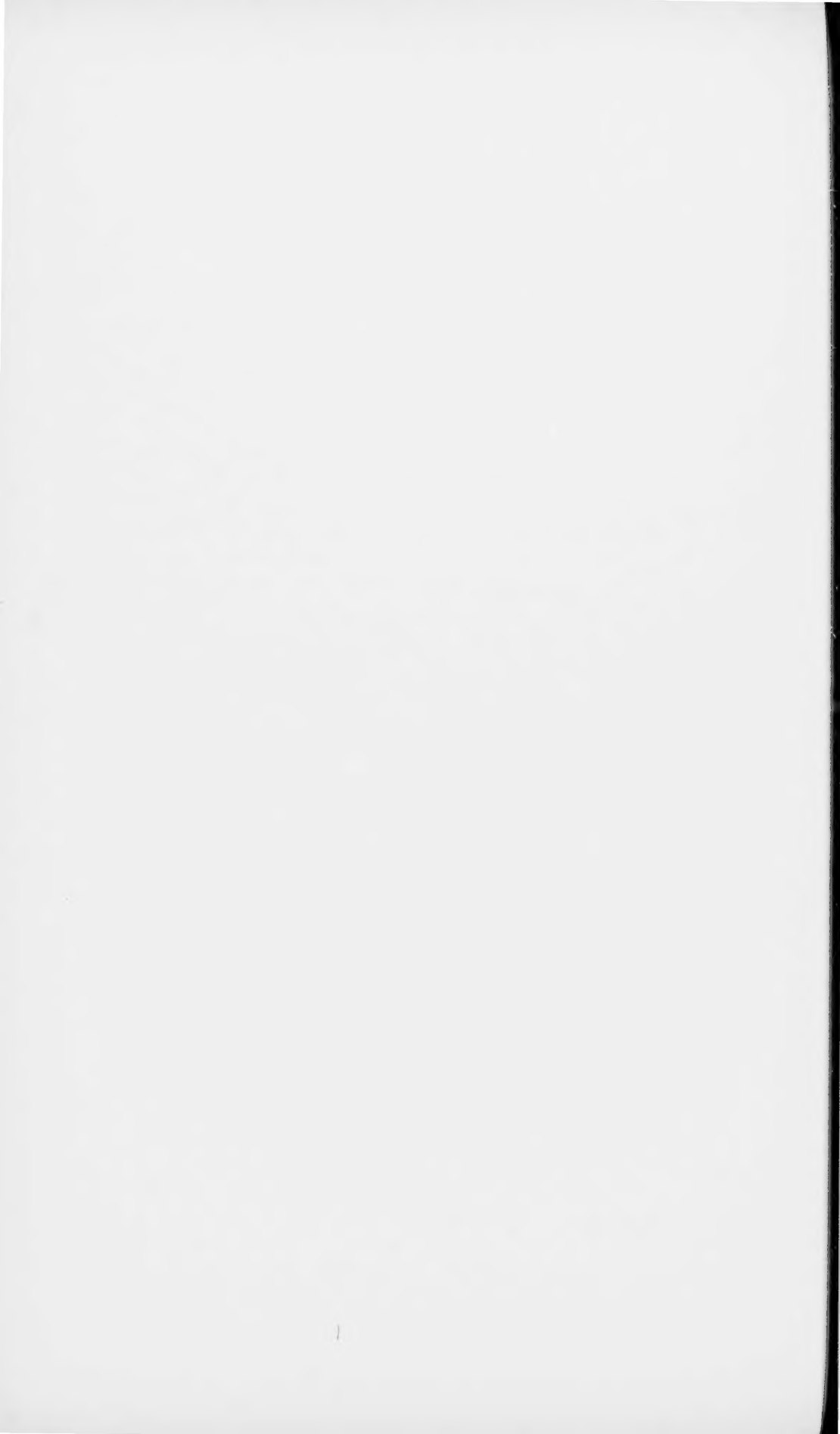


Cir. 1985)(en banc), cert. dismissed, 107 S.Ct. 16 (1986). Even if so, on the facts adduced at trial, this court declares it would have found the defendants not to be qualifiedly immune.

B. Access to Courts

1. Qualified Immunity

Defendants argue that the right of access to courts was not clearly established -- at least not in the context of litigation over seized property -- when the search took place in 1981. "A substantive right of access to courts has long been recognized." Jackson, 789 F.2d at 310. Recognition of this right "has from its inception been applied to civil as well as constitutional claims." Id. at 311 (citing Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907)). Access to the courts is a civic entitlement "conservative of all other rights." Chambers, 207 U.S. at 148.



1

The Fifth Circuit has instructed that judgments concerning the standard of knowledge to which police officers are held "must be tempered with reason We cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law." Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982). Nevertheless, "[p]olice officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens." Id. Although "[t]he contours of the right must [have been] sufficiently clear that a reasonable official would understand that what he is doing violates that right," Anderson, 107 S.Ct. at 3039, "[t]his is not to say that an official action is protected by qualified immunity



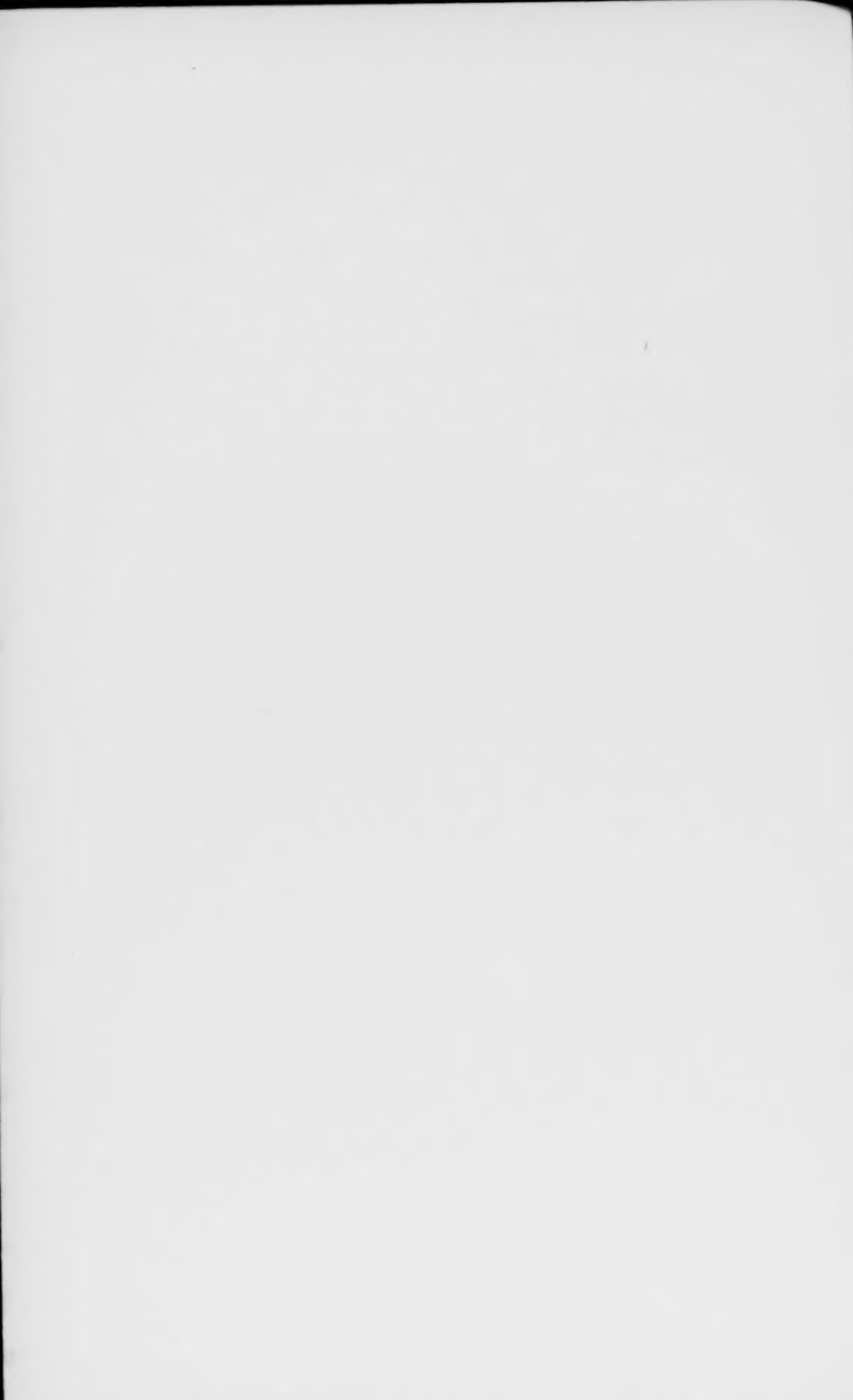
unless the very action in question has previously been held unlawful," Id. (citing Mitchell v. Forsyth, 472 U.S. 511, 535 n. 12 (1985)).

There exists an "inevitably close relationship between the immunity and merits" of this case. Mitchell v. Forsyth, 472 U.S. 511, 545 (1985) (Brennan, J., concurring and dissenting). The Crowders' right of access to the courts was violated when defendants deliberately removed the seized property from Texas -- where claims to the property could most expeditiously be litigated -- to Arkansas. Whether defendants should have known that their action would violate the Constitution can be judged in part, by the predictability and severity of the deprivation plaintiffs suffered. Every policeman can fairly be expected to know that citizens possess the right to litigate

search and seizure issues, including issues of ownership and disposition of property. These defendants stress that Miller County was a mere six blocks away from the scene of the search as if Texarkana, Arkansas, and Texarkana, Texas, were fungible jurisdictions -- which, of course, they are not. The right of access to court obviously was implicated in this situation, and defendants are not entitled to qualified immunity.

2. Absolute Immunity

District Attorney Raffaelli and Assistant District Attorney Elliott claim absolute quasi-judicial immunity from liability. See generally Imbler v. Pachtman, 424 U.S. 909 (1978). The Fifth Circuit has held that investigative activities -- "including decisions as to when, and the manner in which, a search and/or seizure shall be conducted" --



are not quasi-judicial in nature and hence are not covered by the "Imbler umbrella." Marrero v. City of Hialeah, 625 F.2d 499, 508 .11 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981) (emphasis added). The jury reasonably found both prosecutors to have been acting in an investigative rather than a prosecutorial role on the night in question. This finding disposes of Raffaelli's and Elliott's absolute immunity claims.

V. Governmental Liability

Section 1983 liability may be imposed on a local government if the constitutional violation is due to official action, policy or custom. Monell v. Department of Social Services, 436 U.S. 658 (1978). In Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984) (en banc) (per curiam) (modifying 728 F.2d 762 (en banc)), cert. denied, 472 U.S. 1006 (1985), the Court of Appeals



for the Fifth Circuit defined "official policy" as

1. A policy statement, ordinance, regulation, or decision that is officially adopted or promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted or promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making author-



ity. Id. at 862.

Defendants argue, accurately but irrelevantly, that governmental custom -- as described in the second of Bennett's two definitions of "official policy" -- cannot be proved through a single occurrence. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). Plaintiffs, however, claimed county liability under the separate valid theory that "a deliberate choice to follow a course of action [was] made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 106 S.Ct. 1292 1300 (1986) (plurality opinion); see generally Crane v. State of Texas, 759 F.2d 412, 428-30, modified on other grounds, 766 F.2d 194 (5th Cir.), cert. denied, 106 S.Ct. 570 (1985). They contend that Miller County,



Sevier County, and Bowie County are liable because Sheriff Sinyard, Sheriff Godwin, and District Attorney Raffaelli were elected policymakers whose official decisions worked a deprivation of the Crowders' constitutional rights.

"Whether an official had final policymaking authority is a question of state law." Pembaur, 471 U.S. at 1300. In Arkansas, county sheriffs are popularly elected for a two-year term "with such duties as are now or may be prescribed by law . . ." Ark.Const. Art.7, Sec. 46 (1947). The office's constitutional origins reach back to the time of statehood. Taylor v. Governor, 1 Ark.(1 Pike) 21 (Ark. 1837). By statute, sheriffs are broadly responsible for exercising the police powers of their respective counties: "It shall be the general duty of each sheriff to quell and suppress all assaults and batteries,



affrays, insurrections, and unlawful assemblies; and he shall apprehend and commit to jail all felons and other offenders; and shall attend upon all courts held in other acts and things that are or may be required by law." Ark. Stat. Ann. §17-3601(a)(5) (Repl. 1980). It is further provided that "[e]ach sheriff shall be a conservator of the peace in his county and shall cause all offenders against the laws of [Arkansas] in his view or hearing to enter into recognizance to keep the peace" Ark. Stat. Ann. §12-1108 (Repl. 1979).

The governing body of Arkansas county governments -- denominated quorum courts -- have no policymaking role regarding the sheriff's discharge of his law enforcement duties. Counties may opt to give control of sheriff's department personnel decisions to a civil service commission, Ark. Stat. Ann. §§12-1120 et

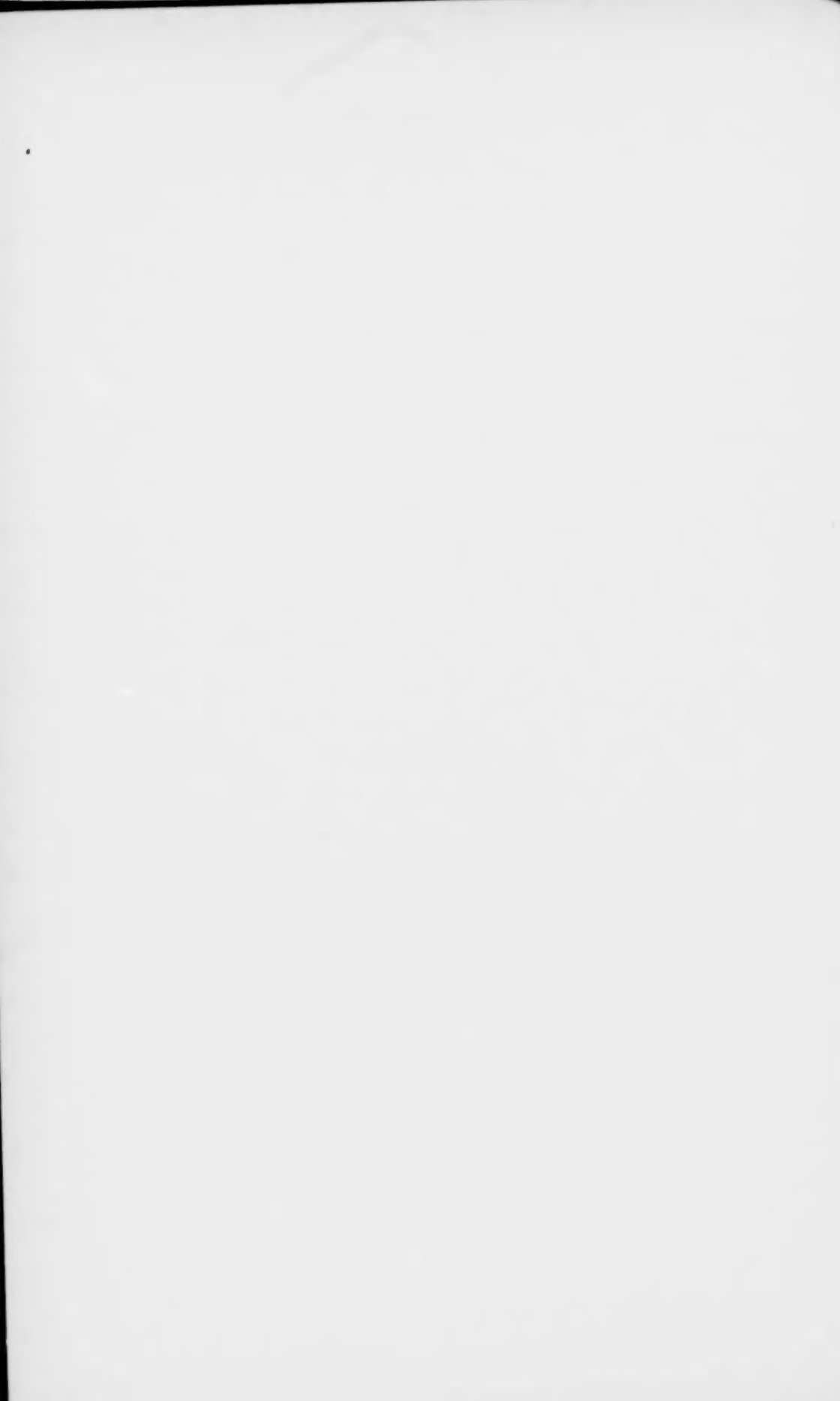
seq. (Repl. 1979), and each county fixes its sheriff's compensation within a range prescribed by the legislature. Art.Stat. Ann. §17-4201 (Repl. 1980). A 1974 constitutional amendment -- effective in 1977 -- allows counties to replace their sheriff's department with an unelected Department of Public Safety; this provision affords little coercive leverage to the quorum court, however, because reorganizations are subject to referendum and receive close judicial scrutiny. Ark. Const. Amdt. 55 sec. 2(b) (1985 supp. to 1947 ed.); Ark.Stat.Ann. §§17-3703 to 17-3710 (Repl. 1980); see Clark County, Arkansas v. Miller 291 Ark. 203, 723 S.W.2d 820 (Ark. 1987). Finally, removal of an elected sheriff for misconduct while in office may only take place pursuant to a judgment issued by the county circuit court, a judicial body; the legislative quorum court has



no power in this regard. Ark.Stat.Ann. §43-2319 (Repl. 1980).

Given their broad authority and practical autonomy, elected Arkansas sheriffs clearly are officials "whose acts or edicts may fairly be said to represent official policy." Monell, 436 U.S. at 694. Sinyard's deliberate decisions -- to undertake an unconstitutional search and to remove seized property beyond the jurisdiction of Texas courts -- exposed Miller County to liability under Section 1983. Similarly, Godwin's choice to participate in the search is attributable to Sevier County.

The City of DeQueen demands judgment on the grounds that "[a] city may be liable only when the city council or governing board, either by direct orders or by setting a course of action for city employees, interferes with individual rights." Brief in Support of Motion



for J.N.O.V. at 2. This is not the law. Plaintiffs contend that Jones, as an Arkansas police chief, was a policymaker by virtue of his office -- much like an elected sheriff. This is also incorrect. Under Arkansas law, "[t]he duty of the Chief and other offices of the police . . . shall be under the direction of the Mayor," Ark. Ann. Stat. [sic] §19-1705 (Repl. 1980). In cities like DeQueen, with the city manager form of government, the city manager possesses "all powers (except those involving the exercise of sovereign authority) . . . vested in the Mayor." Ark. Ann. Stat. §19.712 (Repl. 1980). Supervising the police would appear to be an administrative rather than a sovereign function. The formal subservience of an Arkansas police chief to the city's governing body is underscored by the city's freedom to abolish the office outright. See Ellis v.

Allen, 202 Ark. 1007, 154 S.W.2d 815
(Ark. 1941).

The uncontradicted testimony of Jones, however, showed that he was a delegee of policymaking authority. Jones testified that he established all police policies for the city, and that the city manager and the city governing board had never interfered with his operation of the department. Although cities should not be held liable for the unauthorized, unsanctioned acts of non-policymakers, Jones presents a case in which denying municipal liability would allow the city to immunize itself simply by hiring an at-will employee, such as a police chief, and vesting him with absolute discretion that far exceeds his titular status. The policymaking authority of the City of DeQueen surely resided somewhere; Jones testified that it lay with him, and defendants raised no

contrary inference. Given this record, the jury could reasonably have found Jones to have acted in an official capacity.

Bowie County, Texas, contends that no county policymaker made "a conscious decision . . . to place the constitutional rights of the Plaintiffs in jeopardy," Brief in Support of Motion for J.N.O.V. at 2-3. This argument lacks merit: "It is well settled that there is no requirement of specific intent in actions under section 1983." Ryland, 708 F.2d at 975 (citing Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 484 (1961) and Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 1219 (1987)). The county also denies that District Attorney Raffaelli or Assistant District Attorney Elliott acted pursuant to official policy or custom. Because the jury properly held Raffaelli to be a policymaker -- whose

single decisions, as discussed above, may subject to liability the jurisdiction he serves -- this court does not reach the preexisting custom or policy issue.

At trial, several witnesses testified that the seized property was released to Arkansas participants on Raffaelli's authority. Adams entirely delegated this crucial decision to the district attorney. District Attorney Raffaelli's role in this regard resembles that of the county prosecutor discussed by the Supreme Court in Pembaur. There "[p]ursuant to standard office procedure the Sheriff's office referred [the question whether to forcibly enter a business] to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was 'the proper thing to do' in this case. We decline to . . .

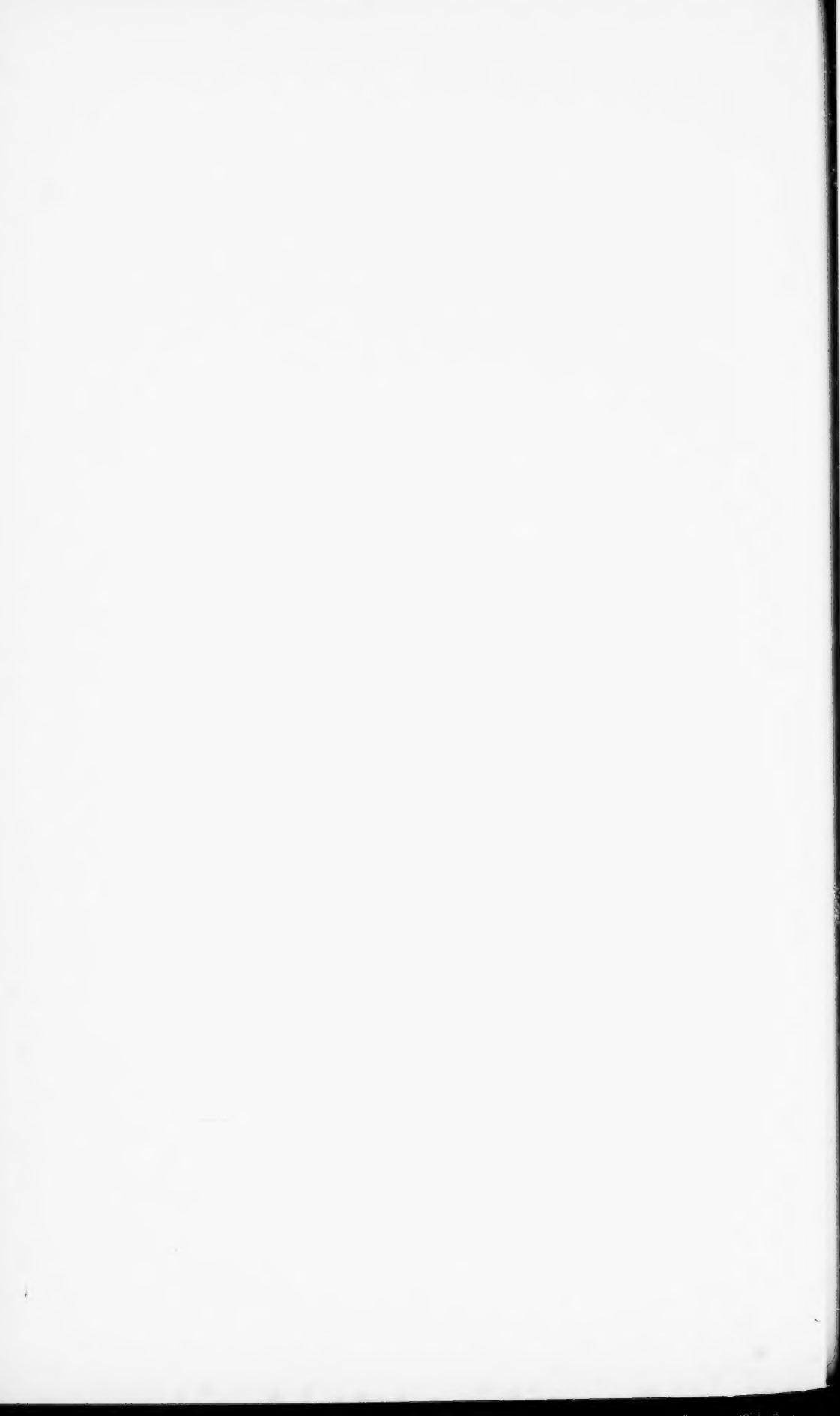
overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere 'legal advice.' In ordering the Deputy Sheriffs to enter . . . the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under §1983." Pembaur, 106 S.Ct. at 1301.

The Court noted that an Ohio statute required county prosecutors to advise the police on request. Although Texas has no such statute, Raffaelli was making county policy on a matter committed to his policymaking discretion as elected district attorney. Raffaelli ordinarily would have the last word on the county's position regarding proposed dispositions of seized property by the courts; Bowie County is not exculpated because its district attorney chose to implement that position without benefit

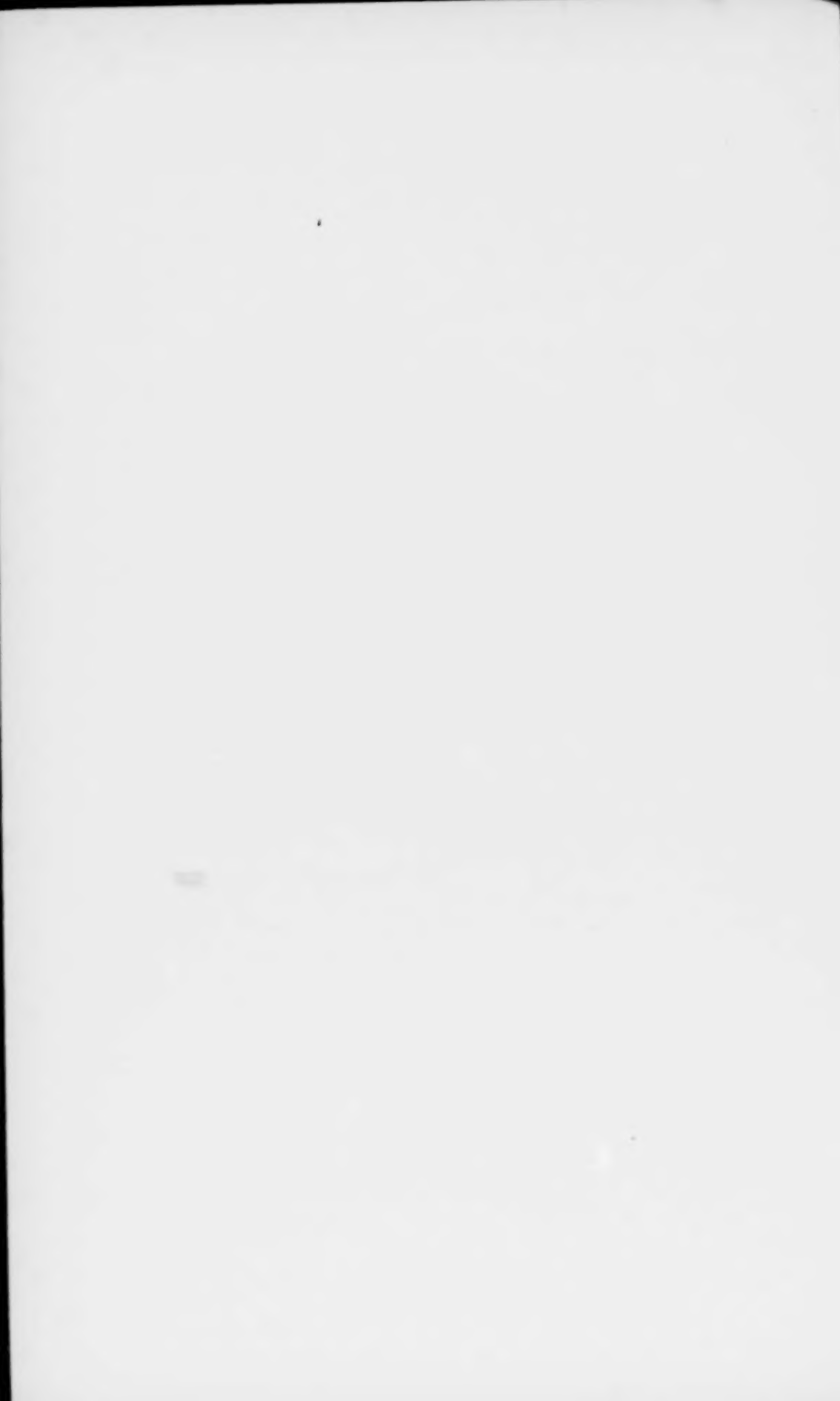
of judicial sanction.

The City of Texarkana, Texas, was held liable on a finding that two nonpolicymakers -- Adams and Campbell -- acted pursuant to municipal policy in causing the seized property to be released to Arkansas law enforcement officers. At trial, plaintiffs maintained that Adams and Campbell were guided by two distinct Texarkana policies: (1) to defer, on certain search and seizure issues, to decisions made by the Bowie County district attorney; and (2) to cooperate -- freely and routinely -- with Arkansas officials in the investigation of crimes and the recovery of stolen property. Texarkana officials testified that both policies existed in 1981.

Plaintiffs claim that Adams and Campbell applied constitutionally sound policies in an unconstitutional manner.



An unresolved controversy exists over whether a municipal policy must be unconstitutional on its face before \$1983 liability may be imposed on the city. See generally Nahmod, Civil Rights and Civil Liberties Litigation 372-74 (2nd ed. 1986 and Supp. 1987). The Fifth Circuit appears to require facial unconstitutionality. See Ramie v. City of Hedwig Village, Texas, 785 F.2d 490 493 (5th Cir. 1985), cert. denied, 106 S.Ct. 809 (1986) (construing Bennett v. City of Slidell, 728 F.2d 702 (5th Cir. 1984)). Because both policies at issue here concededly were constitutional, plaintiffs' judgment against the City of Texarkana -- arguably the most blameworthy government defendant -- must be set aside. But cf., City of Oklahoma City v. Tuttle, 471 U.S. 808 834-44 (1985) (Stevens, J., dissenting) (requiring any showing of "official policy" as a



precondition to municipal liability under §1983 is "judicial legislation of the most blatant kind," Id. at 842).

VI. Damages

Plaintiffs and defendants disputed, through conflicting evidence and competing inferences from the circumstances, whether the Crowders' post-search loss of business income was due to the search, whether the search played a role in James Ralston Crowder's subsequent coronary difficulties, and the emotional impact of the disputed events on the elderly couple. The jury's award of compensatory damages reflects a permissible choice among several defensible alternatives. Their decision to exact punitive damages from each liable defendant is also -- except with regard to Campbell -- one of several possible and rational outcomes within the fact-finder's discretion. See, e.g. Longoria



v. Wilson, 730 F.2d 300, 305-06 (5th Cir. 1984).

VII. Conclusion

The motions of Charles Campbell and of the City of Texarkana, Texas, for judgment notwithstanding the verdict shall be granted; the remaining defendants' motions for judgment or new trial shall be denied. Pending motions for stay of execution and for supersedeas bond are mooted by this opinion; defendants may move for stay pending appeal should an appeal be taken. The amended judgment on attorney's fees shall be further amended to omit Campbell and the City of Texarkana, who cannot be held liable for fees under 42 U.S.C. §1988 in the absence of liability under §1983. Kentucky v. Graham, 473 U.S. 159, 165 (1985). The motions of all other defendants to vacate the fee award shall be denied.

SIGNED this 14th day of December,
1987.

/S/ William Wayne Justice
CHIEF JUDGE



App. D: FINAL JUDGMENT ON JURY VERDICT
entered April 9, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

RALSTON CROWDER AND) (
NANCY CROWDER) (
) (
V.	) (	CIVIL ACTION NO.
	) (	TY-81-386-CA
) (
KEN SINYARD, ET AL.) (
) (

FINAL JUDGMENT

This action came on for trial before the court and a jury duly empaneled, the Honorable William Wayne Justice, United States District Judge, presiding, and the issues having been tried and the jury having rendered its verdict, it is hereby

ORDERED and ADJUDGED that the plaintiff, Ralston Crowder, recover the sum of Eighty Thousand and No/100 (\$80,000.00) Dollars in compensatory damages with interest thereon at the rate



of 7.06 percent. from the date of judgment, as provided by law, from the defendants, City of DeQueen, Arkansas; City of Texarkana, Texas; Bowie County, Texas; Miller County, Arkansas; Sevier County, Arkansas; Ken Sinyard; H. L. Phillips, Allen Jordan, David Godwin, Bill Jones, Gary Adams, Louis Raffaelli, James Elliott, Charles Lambert, and Charles Ray Campbell, jointly and severally, and it is further

ORDERED and ADJUDGED that the plaintiff, Nancy Crowder, recover the sum of Ten Thousand and No/100 (\$10,000.00) Dollars in compensatory damages, with interest thereon at the rate of 7.06 percent. from the date of judgment, as provided by law, from defendants, City of DeQueen, Arkansas; City of Texarkana, Texas; Bowie County, Texas; Miller County, Arkansas, Sevier County, Arkansas; Ken Sinyard; H. L. Phillips, Allen

Jordan, David Godwin, Bill Jones, Gary Adams, Louis Raffaelli, James Elliott, Charles Lambert, and Charles Ray Campbell, jointly and severally, and it is further

ORDERED and ADJUDGED that the plaintiffs, Ralston Crowder and Nancy Crowder, recover the sum of One Thousand and No/100 (\$1,000.00) Dollars as punitive damages, with interest thereon at the rate of 7.06 percent. from the date of judgment, as provided by law, from each of the defendants Ken Sinyard; H. L. Phillips, Allen Jordan, David Godwin, Bill Jones, Gary Adams, Louis Raffaelli, James Elliott, Charles Lambert, and Charles Ray Campbell, individually and separately, and it is further

ORDERED and ADJUDGED that the claim of the plaintiffs, Ralston Crowder and Nancy Crowder, for attorney's fees

pursuant to 42 U.S.C. §1988, and their costs of court, be severed. See White v. New Hampshire Department of Employment Security, 455 U.S. 445 451 (1982); Campbell v. Bowlin 724 F.2d 484, 487 (5th Cir. 1984). It is further

ORDERED and ADJUDGED that the plaintiffs take nothing from the individual defendants, Louis Aycock, R. W. Neel, and Don Lambert, and this cause is hereby DISMISSED as to these defendants only.

SIGNED and ENTERED this 9th day of April 1986.

/s/ William Wayne Justice
Chief Judge

App. E: Plaintiffs' Exhibit 13: Order of 102nd District Court of Bowie County, Texas entered February 23 1981, to deposit seized property with Clerk, admitted at trial on the merits on April 24, 1985.

NO. 81-C-180

J. R. CROWDER	) (	IN THE DISTRICT
	) (	COURT
) (
V.	) (	OF
) (
LOUIS RAFFAELLI,) (
JAMES ELLIOTT, DON) (
LAMBERT, LOUIS) (
AYCOCK, AND OTHER	) (	BOWIE COUNTY,
PERSONS UNKNOWN	) (	TEXAS

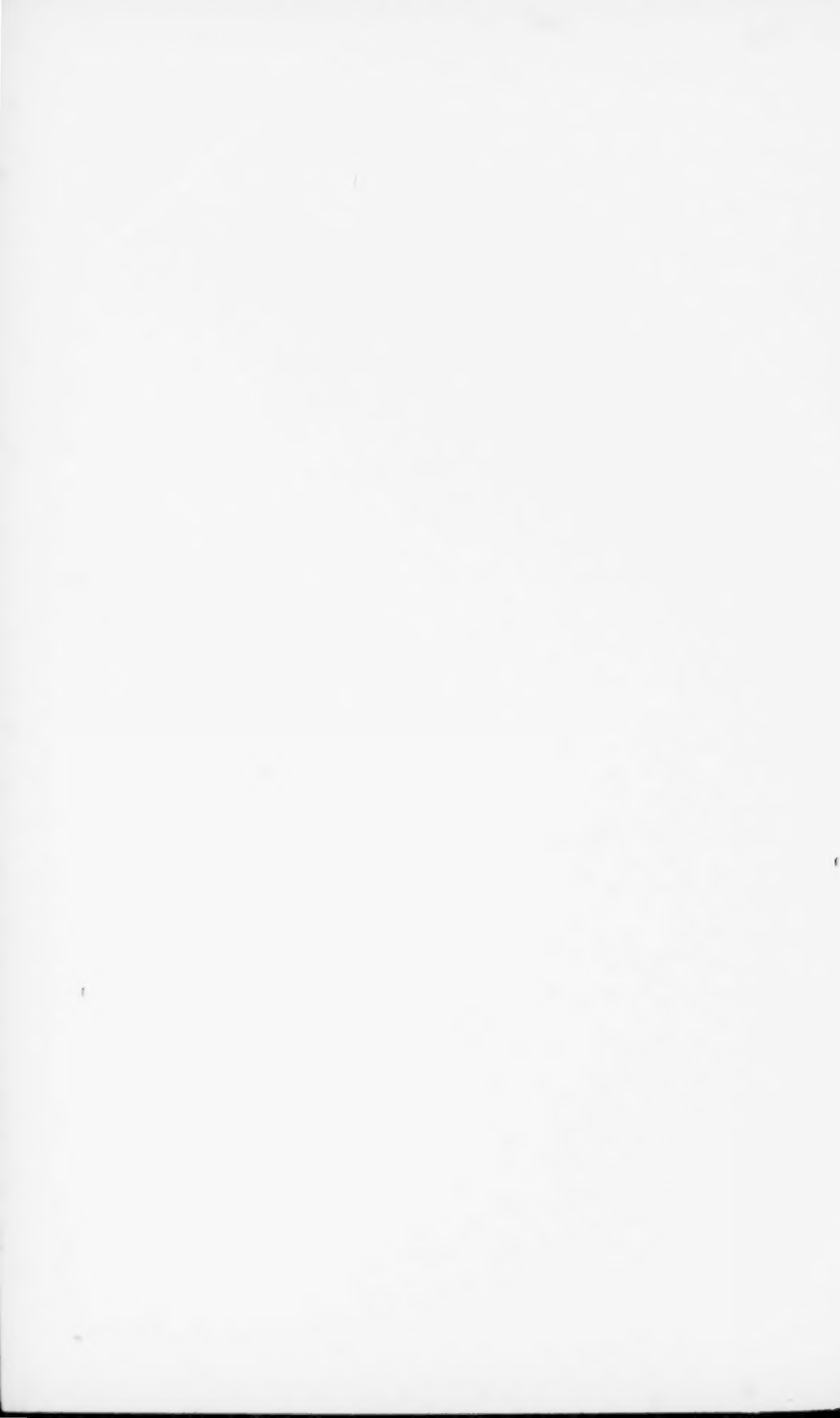
ORDER

ON THIS the 5th day of February, 1981, came on to be considered Plaintiff's request for immediate relief, and the Court being of the opinion that irreparable damage will be suffered by Plaintiff herein, if such relief is not granted;

IT IS THEREFORE ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that Defendants, Louis Raffaelli, James Elliott, Don Lambert and Louis Aycock, immediately

deposit Plaintiff's property which was taken by them on January 28, 1981, in custodia legis with the Clerk of the Court who shall immediately inventory same in concert with an official of the Texarkana National Bank of Texarkana, Texas and upon delivery of said property by the Clerk to the Texarkana National Bank at its offices in Texarkana, Texas said The [sic] Texarkana National Bank of Texarkana, Texas, shall thereafter keep same until further Orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Don Lambert as designee of the Federal Bureau of Investigation; Ken Sinyard as designee of the Miller County Sheriff's Office; Louis Aycok, as designee of the Bowie County District Attorney's Office; Kirk Johnson, as designee of the Miller County Prosecuting Attorney's Office; William Avance, as designee of the Texarkana National Bank



of Texarkana, Texas; Ralston Crowder, as designee for the Plaintiff, be and each are hereby allowed access to view the property seized on January 28, 1981, by the Defendants in the presence of the designee of the Texarkana National Bank of Texarkana, Texas for all purposes during regular banking hours of the Texarkana National Bank. In no case shall such property be removed from the Texarkana National Bank except on the written Order of this Court. The Texarkana National Bank for its services hereunder be [sic] entitled to such reasonable compensation and expenses, as shall be approved by the Court which shall be taxed as costs therein.

SIGNED, RENDERED AND ENTERED this the
20 day of February, 1981.

/s/ _____
LEON F. PESEK, District Judge
102nd Judicial District Court
Bowie County, Texas



App. F: Plaintiffs' Exhibit 14: Order of United States District Court entered April 22, 1982, to return property to jurisdiction of Texas court, admitted at trial on the merits on May 30, 1985 (Deletions at motion of Defendants).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

RALSTON CROWDER AND)	(
NANCY CROWDER)	(
)	(
VS.	)	(	NO. TY-81-386-CA
)	(
KEN SINYARD, ET AL)	(

O R D E R

This action arises out of a search and seizure of valuable items of personal property from the plaintiffs' place of business. This order addresses plaintiffs' motion for Preliminary Injunction wherein plaintiffs seek an order granting the following relief:

(1) That defendants be required to place the property taken in the registry of the Court for safekeeping;

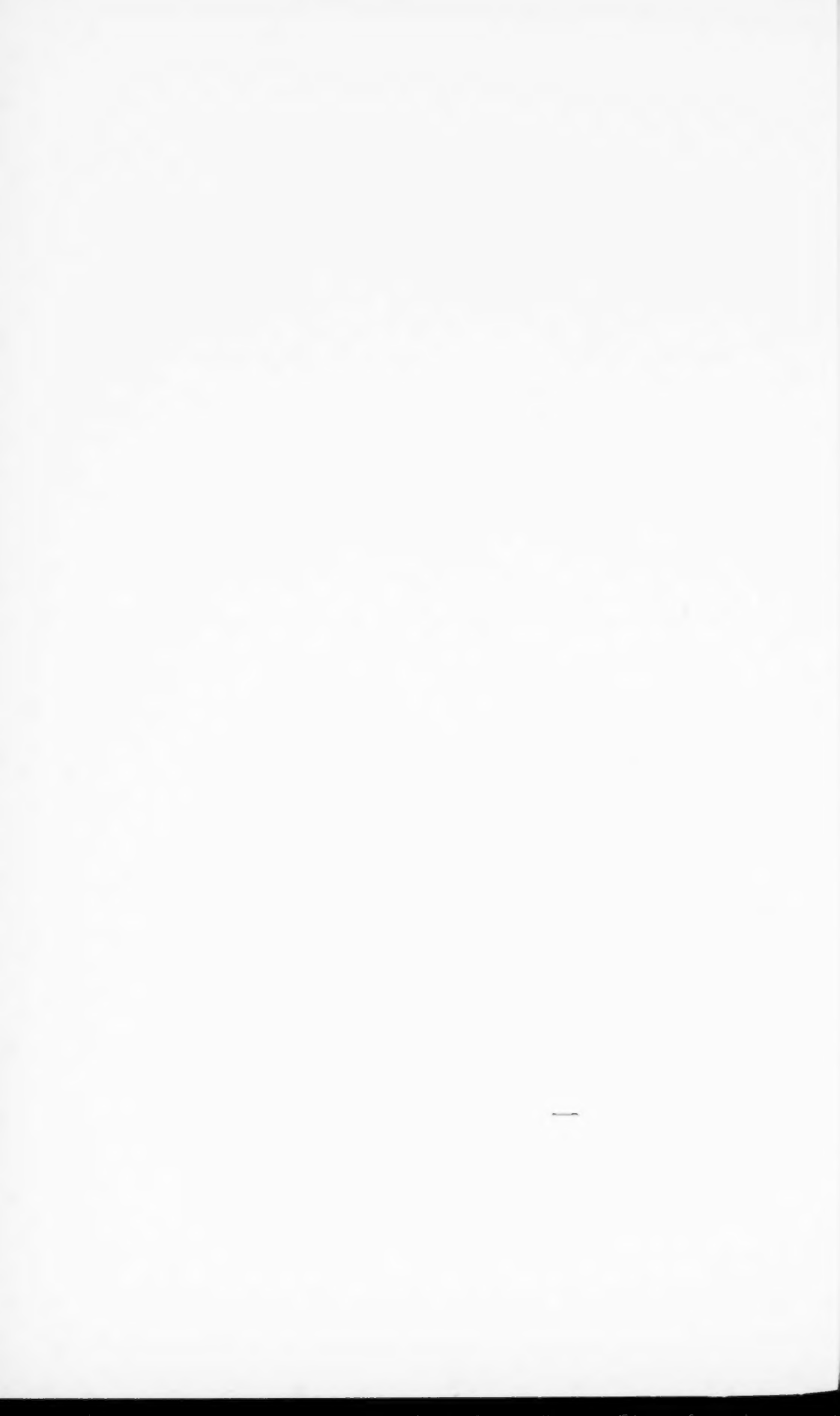


* * * * *

The basic facts surrounding the issuance of the warrant, the seizure and the disposition of such property do not appear to be in serious conflict. On the evening of January 27, 1981, law enforcement officers . . . had in their custody . . . Jimmy Bradshaw . . . who claimed to have committed burglaries in Arkansas and later sold the items taken to Ralston Crowder*, plaintiff herein. Texas officers were confronted with this information and thereafter a search warrant was issued by a Texas Justice of the Peace,, Ben Grigson, Late in the evening on the 27th at approximately 11:30 p.m., the plaintiffs were awakened by the officers and Mr. Crowder . . . accompany the officers to his place of business where a search of the premises was conducted. A number of valuable items were taken by the officers which the suspects believed were

items taken during the alleged burglaries. The property was taken from the place of business in a brown paper bag to the Texarkana, Texas police station. The Texas officers thereafter allowed the property to be taken by the Arkansas officials out of the state for use in possible criminal proceedings in Arkansas. Plaintiffs have asked this Court to require the property taken to be placed in the registry of this Court for safekeeping until a determination is made as to its ownership.

Texas Code of Criminal Procedure, Art. 18.11 provides that property seized under a warrant is to be kept by the officer seizing same subject to order of the magistrate. By allowing the property to be removed from the jurisdiction of the Texas state courts, the remedies which may have been available to the plaintiffs have been frustrated. Plaintiffs did



secure an order from the 102nd Judicial District Court Bowie County, Texas, ordering the property to be delivered to the Clerk of said Court and upon delivery the property was to be held by the Texarkana National Bank, Texarkana, Texas. The District Court's order allowed for the removal of the property, upon approval of the court, thereby preventing disruption of any ongoing criminal proceedings in Arkansas. The Arkansas officials refused to abide by the state court's order.

This Court is of the opinion that having the property returned to the jurisdiction out of which the warrant was issued is necessary in order that the procedures set forth in the Texas statutes may be followed for the protection of all parties who may now or hereafter claim some interest in the property in question. The procedures set out in the state court's order of February 20, 1981, would



provide for the safekeeping of the items at a place within the jurisdiction of the courts involved in the issuance of the warrant, and, at the same time will not interfere with its use, if necessary, in any criminal proceedings in Arkansas. The Court is satisfied that the movants have carried their burden as required for the granting of injunctive relief. Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300 (5th Cir. 1982); Southern Monorail Co. v. Robbins & Myers Inc., 666 F.2d 185 (5th Cir. 1982).

There exists some question as to whether an inventory includes all items taken during the seizure. This and other questions may properly be inquired into once the property is subject to the jurisdiction of the courts responsible for the issuance of the search warrant.

Considering both the convenience to the parties and the State's obligation to



adjudicate matters relating to the safe-keeping of property seized, this Court is of the opinion that rather than having the property placed in the registry of this Court, it should be delivered to the Clerk of the 102nd Judicial District Court, Bowie County, Texas, and thereafter be subject to the control of that Court as set forth in the February 20, 1981 order, a copy which [sic] is attached hereto.

It is, therefore, ORDERED, ADJUDGED and DECREED that the property seized from plaintiffs' business here in question be delivered within ten days from receipt of this order to the Clerk of the 102nd Judicial District Court, Bowie County, Texas. As to any property that has been disposed of in any manner, whether returned to a prior owner or otherwise a written explanation of such disposals or disbursements shall accompany the property delivered to the Clerk. To this extent



plaintiffs' motion is GRANTED; other relief sought is hereby DENIED.

It is further ORDERED that plaintiffs shall be required to file with the Clerk of this Court a security bond in the amount of Five Thousand Dollars (\$5000.00).

SIGNED this 22nd day of April, 1982.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE